Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondent.

On Petition For A Writ Of Certiorari
To The New York State Supreme Court,
Appellate Division, First Department

PETITION FOR A WRIT OF CERTIORARI

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December 26, 1995

151 PP

QUESTIONS PRESENTED

1. Whether, under the Supremacy and Due Process Clauses of the United States Constitution, a state court can dismiss federal civil rights claims regarding state tax assessment methods brought under 42 U.S.C. §1983 because the only state remedy for assessment claims is a proceeding which does not examine such methods but determines the assessment *de novo*.

2. Whether, under the Due Process Clause of the United States Constitution, federal civil rights claims dismissed for lack of standing can be *res judicata* on the merits against the claimant in a later proceeding when the claimant has standing.

3. Whether, under the Due Process Clause of the United States Constitution, federal civil rights claims denied in a prior state proceeding which did not provide a fair opportunity to present the claims can be *res judicata* in a subsequent proceeding bringing similar claims based in relevant part on new factual and legal grounds arising after the first proceeding.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 2

GROUNDS FOR JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 3

A. Constitutional Provisions 3
B. Statutory Provisions 3
C. Regulatory Provisions 3

STATEMENT OF THE CASE 4
A. Statement of Facts 5
B. Prior Proceedings 10

REASONS FOR GRANTING THE WRIT 11

I. THE STATE COURT DECISION PRECLUDES AN INDIVIDUAL TAXPAYER FROM CHALLENGING THE LEGALITY OR CONSTITUTIONALITY OF STATE REAL PROPERTY ASSESSMENT METHODS 11

PAGE

A. The Decision Relegates Petitioner To State Proceedings Which Will Neither Address Nor Remedy Legal Or Constitutional Objections To The Assessors' Methods 11

B. The Decision Conflicts With The Supremacy Clause Of The United States Constitution And Rulings Of this Court Which Require State Courts To Entertain §1983 Proceedings 15

II. THE STATE COURT DECISION CONFLICTS WITH RULINGS OF THIS COURT BY GIVING *RES JUDICATA* EFFECT TO A PRIOR STATE PROCEEDING WHICH DID NOT PROVIDE A REAL OPPORTUNITY TO PRESENT PETITIONER'S CONSTITUTIONAL CLAIMS 16

CONCLUSION 21

APPENDICES:

Appendix A: Opinion and Order of New York State Supreme Court, Appellate Division, First Department, Entered July 6, 1995 (with Notice of Entry) 1a

Appendix B: Opinion and Order of the New York State Court of Appeals Entered September 26, 1995 ..... 4a

PAGE

Appendix C: Decision and Judgment of New York State Supreme Court, New York County, Entered February 7, 1994 (With Notice of Entry) 6a

Appendix D: Order of New York State Supreme Court, New York County, Entered April 11, 1994 Denying Reargument Of Dismissal (with Notice of Entry) 12a

Appendix E: Order of New York State Supreme Court, New York County, Entered August 11, 1987 Dismissing Claims For Lack Of Standing In The 1987 Proceeding 14a

Appendix F: Order and Decision of New York State Supreme Court, New York County, Entered January 6, 1988 Dismissing Petition in the 1987 Proceeding 20a

Appendix G: Order of New York State Supreme Court, New York County, Entered December 13, 1988 Denying Reargument Of Dismissal in the 1987 Proceeding 24a

Appendix H: Order of New York State Supreme Court, Appellate Division, First Department, Entered February 23, 1989 in the 1987 Proceeding 26a

Appendix I: Order of New York State Court of Appeals Entered January 4, 1990 in the 1987 Proceeding 28a

Appendix J: Petition Dated June 15, 1993 (Excerpts) 29a

Appendix K: Petitioner's Affidavit In Opposition To Motion To Dismiss Petition dated September 13, 1993 (Excerpts) 41a

Appendix L: Notice of Appeal of State Supreme Court Decision and Judgment Entered February 7, 1994, With Civil Appeal Pre-Argument Statement (Without Attachments) 51a

Appendix M: Petitioner's Affidavit In Support Of Motion To Vacate Decision And Reargue Dismissal (Excerpts) 60a

Appendix N: Notice of Appeal Of Order Entered April 11, 1994 Denying Reargument Of Dismissal, With Civil Appeal Pre-Argument Statement (Without Attachments) 68a

Appendix O: Notice of Appeal As Of Right of Decision of Appellate Division, First Department, Entered July 6, 1995 (Without Attachments) 77a

Appendix P: Appellant's Jurisdictional Statement to New York State Court of Appeals Dated August 15, 1995 (Without Attachments) 80a

Appendix Q: Appellant's Letter to New York State Court of Appeals Dated September 5, 1995 in connection with *sua sponte* review 89a

PAGE

Appendix R: Respondent's Notice Of Motion Dated June 8, 1987 To Dismiss The Petition For Lack Of Standing in the 1987 Proceeding (Without Attachments) 97a

Appendix S: Respondent's Verified Answer Dated November 27, 1987 in the 1987 Proceeding 99a

Appendix T: Petitioner's Affidavit In Support Of Motion To Reargue Dismissal Of The Petition in the 1987 Proceeding (Without Exhibits) 102a

Appendix U: Fifth and Section l, Fourteenth, Amendments to United States Constitution 108a

Appendix V: Article VI, Clause 2, United States Constitution 109a

Appendix W: Title 42, §1983, United States Code .. 110a

Appendix X: Title 28, §1341, United States Code ... 111a

Appendix Y: §5601(b)(1) and §5602(a)(1)(i), New York Civil Practice Law and Rules ... 112a

Appendix Z: §305 and §489.9, New York Real Property Tax Law 113a

Appendix AA: §202.60, New York Supreme Court Civil Rules 115a

TABLE OF AUTHORITIES

CASES **PAGES**

Abrams v. New York City Transit Authority, 48 A.D. 2d 69, 368 N.Y.S. 2d 165 (1st Dept. 1975), *aff'd*, 39 N.Y. 2d 990, 355 N.E. 2d 289 (1976) 18

Allegheny Pittsburgh Coal v. Webster County, 488 U.S. 336 (1989) 15

Barklee Realty Company v. New York City Dept.of Finance, 147 A.D. 2d 994 (1st Dept. 1989), *permission to appeal denied*, 75 N.Y. 2d 702 (1990) 7

Block v. Commissioners, 99 U.S. 686 (1878) 17

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 17

Commissioner v. Sunnen, 333 U.S. 591 (1948) 20

Davis v. Wakelee, 156 U.S. 680 (1895) 19

Fair Assessment In Real Estate Assn. v. McNary, 454 U.S. 100 (1981) 15

Felder v. Casey, 487 U.S. 131 (1988) 16

Goldberg v. Kelly, 397 U.S. 254 (1970) 14

Hilton v. Fahrenkopf, 279 N.Y. 49, 17 N.E. 2d 765 (1938) 14

PAGE

Iowa-Des Moines Nat. Bank v. Bennett,
284 U.S. 239 (1931) 16

Kraebel v. New York City Dept. of Finance,
__ A.D.2d __ (1st Dept.), *appeal den.*,
86 N.Y. 2d 835 (1995) 2, 11

Kremer v. Chemical Construction Co., 456 U.S. 461,
reh. den., 458 U.S. 1133 (1982) 17

Lawlor v. National Screen Serv. Corp.,
349 U.S. 322 (1955) 20

Lynch v. New York, 293 U.S. 52 (1934) 18

Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284,
169 N.E. 386 (1929) 18

Matter of Hayhorn v. Carroll,
225 N.Y. 84, 121 N.E. 463 (1918) 18

Merrick Holding Corp. v. Bd. Of Assessors,
45 N.Y.2d 538, 382 N.E.2d 1341 (1978) 13

Monell v. New York City Dept. of Social Services,
436 U.S. 658 (1978) 16

Pepsi-Cola Co. v. Tax Comm'n, 19 A.D. 2d 56,
240 N.Y.S. 2d 770 (1st Dept. 1963) 12, 13

Swift v. McPherson, 232 U.S. 51 (1914) 17

Vicksburg v. Henson, 231 U.S. 259 (1913) 17

STATUTES AND RULES **PAGE**

28 U.S.C. §1257(1) 2

28 U.S.C. §1341 ..... 3, 15

28 U.S.C. §2403(b) 2

42 U.S.C. §1983 ..... 3, 4, 10, 15, 16

N.Y. Civ. Pract. Law and Rules Article 78 ..... 5, 8, 10

N.Y. Civ. Pract. Law and Rules §5601(b)(1) 3, 11, 18

N.Y. Civ. Pract. Law and Rules §5602(a)(1)(i) 3, 18

N.Y. Freedom of Information Law 5, 6, 18

N.Y. Real Property Tax Law Article 7 ..... 8-10, 13-15

N.Y. Real Property Tax Law §305 ..... 3, 10-12

N.Y. Supreme Court Civil Rule §202.60 ..... 3, 14

New York Real Property Tax Law §489 . 3, 7, 8, 12, 15, 20

U.S. CONSTITUTION SECTIONS

Article VI, Clause 2 ..... 3, 16

Fifth Amendment 3

Fourteenth Amendment 3

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December 26, 1995

OPINIONS BELOW

The order of the New York State Court of Appeals dismissing Petitioner's appeal was entered on September 26, 1995 (Appendix B at 4a-5a), and is officially reported as *Kraebel v. New York City Dept. of Finance*, 86 N.Y. 2d 835 (1995). The order of the New York State Supreme Court, Appellate Division, First Department, entered July 6, 1995 (Appendix A at 1a-2a), will be officially reported as *Kraebel v. New York City Dept. of Finance*, __ A.D.2d __ (1st Dept. 1995). The decision, order and judgment of the New York State Supreme Court, County of New York, entered February 7, 1994 (Appendix C at 6a-10a), is apparently not officially or unofficially reported. The order of said Court entered April 11, 1994, denying Petitioner's motion to vacate said judgment and reargue dismissal (Appendix D at 12a-13a), is apparently not officially or unofficially reported.

GROUNDS FOR JURISDICTION

The decision of the Appellate Division, First Department, was entered on July 6, 1995. Petitioner's appeal of said decision to the New York State Court of Appeals as of right was dismissed on September 26, 1995. In accordance with Rule 13.1 of this Court, this Petition is filed within 90 days of the date of denial of state review. This Court has jurisdiction under 28 U.S.C. §1257(a) because a right is specially claimed under the United States Constitution and a United States statute.

As required by Rule 29.4(c) of this Court, Petitioner states that 28 U.S.C. §2403(b) may be applicable because this proceeding draws into question the constitutionality of a State statute.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

A. Constitution Provisions.

Article VI, Clause 2 (Appendix V at 109a)

Fifth Amendment (Appendix U at 108a)

Fourteenth Amendment, Section 1
(Appendix U at 108a)

B. Statutory Provisions.

United States Code, Title 28, §1341
(Appendix X at 111a)

United States Code, Title 42, §1983
(Appendix W at 110a)

New York Civil Practice Law and Rules §5601(b)(1)
(Appendix Y at 112a)

New York Civil Practice Law and Rules §5602(a)(1)(i)
(Appendix Y at 112a)

New York Real Property Tax Law §305
(Appendix Z at 113a)

New York Real Property Tax Law §489.9
(Appendix Z at 114a)

C. Regulatory Provisions.

New York Supreme Court Civil Rule §202.60
(Appendix AA at 115a-120a)

STATEMENT OF THE CASE

This case was brought to determine whether, consistent with due process of law and equal protection of the laws, a city may assess real property on the basis of "value" determined in the unfettered discretion of the assessor, without binding rules or guidelines and using disparate theories, hypothetical factual assumptions, inappropriate models and comparisons, and procedures that defeat statutory tax benefits.

This case raises the issue as to whether, consistent with due process of law, equal protection of the laws, and 42 U.S.C. §1983, the state may bar a taxpayer harmed by assessment methods from challenging their legality and constitutionality in a judicial proceeding and leave as the taxpayer's only remedy annual administrative and legal proceedings in which the methods of the assessor are not examined but tax commissioners and courts substitute their own determinations of value made *de novo*.

This case also raises the issue as to whether, consistent with due process of law, the state may bar claims under 42 U.S.C. §1983 as *res judicata* on their merits because similar claims were brought in a prior proceeding even if in the prior proceeding the claims were dismissed for lack of standing and were not fully and fairly litigated. This case also presents the issue as to whether such a prior proceeding can bar constitutional claims based on new factual and legal grounds which did not arise until after the prior proceeding.

A. Statement of Facts.

Petitioner owns a 16-unit walkup apartment building known as 205 West 147th Street, New York, New York (Property). From April 1984, when Petitioner acquired the Property, until January 1987 Respondent assessed the Property at $16,000, of which $4,500 was for the land and $11,500 for the building.

In 1987 Respondent more than quadrupled the assessment. Upon Petitioner's application, the New York City Tax Commission (Tax Commission) reduced the assessment back to $16,000.

In April 1987, before the Tax Commission acted, Petitioner brought a proceeding under Article 78 of the New York State Civil Practice Law and Rules (CPLR), entitled Proceedings Against Body Or Officer, against Respondent in New York State Supreme Court under Index No. 9465/87 seeking reduction of the assessment and protection against future assessment increases on the ground that Respondent's assessment methods violate constitutional protections of due process of law and equal protection of the laws (1987 Proceeding). In said Proceeding Petitioner also sought information concerning Respondent's assessment methods under the New York Freedom of Information Law (FOIL). After the Tax Commission reduced the assessment for 1987-88, Petitioner amended the petition to delete the claim for such reduction.

Upon Respondent's motion (Appendix R at 97a-98a), the Court dismissed Petitioner's constitutional claims in the 1987 Proceeding by Decision and Order entered August 11, 1987 on the ground that Petitioner did not have standing to contest Respondent's assessment procedures because

Petitioner no longer disputed a specific assessment (Appendix E at 14a-15a, 18a-19a).

After supplying additional FOIL information, Respondent answered the Petition in the 1987 Proceeding solely as it related to the FOIL claim (Appendix S at 99a-101a). The Court then dismissed the FOIL claim and the Petition by Decision, Order and Judgment entered January 6, 1988, which confirmed the order dismissing Petitioner's constitutional claims for lack of standing but also purported to deny them (Appendix F at 20a-23a).

In November 1988 Petitioner moved in State Supreme Court to reargue dismissal of the proceeding based on a newly-issued investigative report for the Mayor concerning Respondent's assessment practices, which supported Petitioner's claims of unequal and subjective assessment methods and demonstrated conclusively that some of Respondent's representations in the proceeding concerning its procedures were false (Appendix T at 102a-107a). The Court denied Petitioner's motion by Order entered December 13, 1988, on the ground that the August 1987 dismissal of Petitioner's constitutional claims for lack of standing was dispositive as to those claims (Appendix G at 24a-25a)*.

Petitioner timely appealed the foregoing orders and decision to the Appellate Division. The Appellate Division affirmed both the dismissal order and the judgment without opinion, but did not rule on the order denying a rehearing

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* The Court erroneously named Petitioner as the prevailing party on the relevant issue in the pre-December 21, 1987 order, but in the only such order in the case, which was the August 11, 1987 order, Respondent prevailed on the relevant issue -- dismissal of Petitioner's constitutional claims for lack of standing.

(Appendix H at 26a-27a). Petitioner requested permission to appeal the decision to the Court of Appeals, which denied such permission without explanation on January 4, 1990 (Appendix I at 28a). *Barklee Realty Company v. New York City Dept. of Finance*, 147 A.D. 2d 994 (1st Dept. 1989), *permission to appeal denied* 75 N.Y. 2d 702 (1990). Throughout these appeals Respondent consistently argued that lack of standing precluded Petitioner's constitutional claims.

While the 1987 Proceeding was in litigation, Respondent kept the assessment of the Property at $16,000. In January 1990 Respondent more than doubled the assessment, which was again reduced to $16,000 upon Petitioner's application to the Tax Commission.

In February 1990 the New York City Department of Housing Preservation and Development (HPD) granted the Property $24,000 of real estate tax abatements for capital improvements to the Property under New York Real Property Tax Law (RPTL) §489 (J51 Program). Under said Program, any increased value of the Property attributable to J51 improvements is exempt from real estate tax for 12 years. In addition, RPTL §489.9 prohibits increases in assessment of J51 properties except under strict limits designed to protect the value of the tax abatements.

There are apparently no procedures in place to ensure that assessors comply with RPTL §489.9. Indeed, Respondent keeps two sets of assessment records regarding J51 properties, and the set used by the assessors does not have the information needed for compliance.

After the Property qualified for J51 benefits, the Respondent increased the assessment precipitously year after year. In 1991 and 1992, Petitioner applied to the Tax Commission for reduction, which offered partial reductions

not satisfactory to Petitioner. Petitioner commenced a tax certiorari proceeding against the Tax Commission under RPTL Article 7 (Article 7 Proceeding) to challenge each of these assessments.

In August 1992 Petitioner brought an Article 78 proceeding against HPD and Respondent to contest their partial denial of benefits under the J51 Program, which was settled in December 1992 when Petitioner and Respondent entered into a Court-ordered Stipulation which extended tax exemption to all of Petitioner's J51 improvements and granted additional tax abatements (Stipulation). The Stipulation also settled the two Article 7 Proceedings, setting the assessments for 1991-92 and 1992-93 at $19,500, of which $3,500 was exempt from tax for J51 improvements.

In January 1993, Respondent increased the assessment to $38,250, allocating $22,500 to the land and $15,750 to the building, with no J51 exemption. There was no change in the Property to justify this increase, no reason to reallocate values between land and building, and no grounds for removing the J51 exemption. Petitioner applied for reduction to the Tax Commission as well as to Respondent under a new administrative procedure. Respondent did not change the assessment but granted a partial although still inadequate J51 exemption. The Tax Commission confirmed the assessment without taking any action on the exemption.

Neither the assessors nor the Tax Commission give reasons for increasing assessments or advise Petitioner of the breakdown of the assessment between land and building. Without this information, Petitioner cannot confirm whether assessments comply with RPTL §489.9.

In assessing the Property, assessors discount many operating costs, impute rental income which is not collectible,

ignore the impact of rent regulations, fail to take into account readily-available information concerning similar City-managed properties, "equalize" the Property with non-comparable properties to determine its value, and in general use non-uniform, non-verifiable, subjective, unreasonable, arbitrary and capricious methods for determining assessments.

By using such methods, the assessors consistently overassess the Property and other comparable rent-regulated buildings. Such overassessment is a significant reason small building owners go out of business, into bankruptcy, or abandon their properties. This enables New York City to seize vast tracts of such housing for nonpayment of taxes, including approximately 85% of the privately-owned housing in the neighborhood where the Property is located.

The only legal recourse a New York property owner has for overassessment is an Article 7 Proceeding, which determines the assessment for the year in dispute *de novo*. In such a proceeding the Court determines the value of the property without examining the methods that the assessor or the Tax Commission use.

Applications to the Tax Commission and Article 7 Proceedings require lengthy forms and detailed financial and other data. The cost, disruption, and uncertainty of repeated administrative and Article 7 Proceedings has severely burdened Petitioner without effecting any improvement in the assessors's methods.

Despite years of administrative complications and legal proceedings regarding assessment of the Property, Petitioner will continue to be subject to this tax process year after year without any assurance that future assessments will be any fairer or more rational than those in the past.

B. Prior Proceedings.

Petitioner brought this proceeding in June 1993 by filing a Petition in the New York State Supreme Court, New York County, under 42 U.S.C. §1983 and CPLR Article 78 (Appendix J at 29a-40a). Petitioner sued to reduce the assessment on the Property for 1993-94 to the amount in effect in the prior year, to continue said assessment while benefits under the J51 Program affect the Property unless Respondent provides detailed and documented explanations for all increases, and to continue said assessment for all future years until adoption and implementation of a rational, equitable and predictable method for assessing the Property. In the Petition, Petitioner asserted that Respondent's methods and RPTL §305 violate the due process and equal protection clauses of the United States Constitution (Appendix J at 33a, 37a-38a).

Respondent moved to dismiss the Petition on the grounds, among others, that an Article 7 Proceeding is the exclusive means of challenging New York real property tax assessments and that Petitioner's constitutional claims were barred by *res judicata* or collateral estoppel on account of the dismissal of the 1987 Proceeding. Petitioner disputed these arguments on due process and supremacy grounds in Petitioner's Affidavit in Opposition (Appendix K at 41a-50a). The New York State Supreme Court granted Respondents' motion, dismissing the Petition on the foregoing grounds (Appendix C at 6a-10a).

Petitioner duly moved to reargue dismissal on the grounds of newly-discovered evidence and other arguments (Appendix M at 60a-67a). The New York State Supreme Court denied said motion (Appendix D at 12a-13a).

Petitioner duly appealed the foregoing dismissal and denial to the Appellate Division, First Department, continuing to assert the foregoing grounds (Appendix L at 51a-59a, Appendix N at 68a-76a). The Appellate Division, by order entered July 6, 1995, unanimously affirmed the State Supreme Court determinations (__ A.D. 2d __; Appendix A at 1a-2a).

Petitioner appealed said decision as of right to the New York State Court of Appeals under CPLR §5601((b)(1), continuing to assert the foregoing federal grounds in Appellant's Jurisdictional Statement and in a letter to the Court in connection with *sua sponte* review (Appendices O, P, and Q at 77a-96a).

The New York State Court of Appeals unanimously denied Petitioner's appeal as of right *sua sponte* for lack of a substantial constitutional question by order issued September 26, 1995 (86 N.Y. 2d 835; Appendix B at 4a-5a).

REASONS FOR GRANTING THE WRIT

I. THE STATE COURT DECISION PRECLUDES AN INDIVIDUAL TAXPAYER FROM CHALLENGING THE LEGALITY OR CONSTITUTIONALITY OF STATE REAL PROPERTY ASSESSMENT METHODS.

A. The Decision Relegates Petitioner To State Proceedings Which Will Neither Address Nor Remedy Legal Or Constitutional Objections To The Assessors' Methods.

RPTL §305 sets forth the method and standard for assessing real property in New York State. RPTL §305.2 requires assessments to be based on value, i.e. market value, or what the property would sell for under ordinary

circumstances. *Pepsi-Cola Co. v. Tax Comm'n*, 19 A.D. 2d 56, 59, 240 N.Y.S. 2d 770, 775 (1st Dept. 1963). RPTL §305.1 endorses the methods for assessing such value in effect in 1981, when §305 became effective.

The New York City housing market has not had "ordinary circumstances" since the imposition of rent regulations in 1945. Market sales of older rent-regulated housing are now virtually non-existent in the neighborhood in which the Property is located and many similar neighborhoods City-wide.

The lack of a market for rent-regulated properties in older neighborhoods as well as the wide disparities among such properties make determinations of value based on comparable sales impossible. Instead, assessors "equalize" distressed rent-regulated properties with properties that have been renovated, that charge market rents, and that operate under completely different legal burdens and benefits than does the Property.

Assessment inequities from misapplication of "market" comparisons are compounded when assessors use assessment methods that do not take into account actual operating conditions of older rent-regulated buildings. The extraordinary administrative and legal expenses, repair and replacement costs, lost rents, and other unusual expenses that apply to such properties are decisive of the value of the Property and other similar New York properties even though they do not apply in normal real estate markets.

With rare exceptions such as RPTL §489.9 for J51 properties, there are no standards for determining value or defining assessment methods in New York statutes or regulations. Determinations of assessment are left to the

essentially unfettered judgment of individual assessors, who can take into account or ignore virtually any information. *Merrick Holding Corp. v. Bd. Of Assessors*, 45 N.Y. 2d 538, 542-543, 382 N.E. 2d 1341, 1342-1343 (1978); *Pepsi-Cola v. Tax Comm'n*, 19 A.D. 2d at 59, 240 N.Y.S. 2d at 775. LeForestier, *Review and Reduction of Real Property Assessments in New York* (2d ed.) §1.01.

The vague statutory standards of RPTL §305 result in subjective, unreasonable, inconsistent, and inherently unreviewable assessments. The multiplicity of considerations in determining assessments, lack of binding guidelines, complex nature of New York City neighborhoods, disparate ownership forms and regulatory structures, and lack of effective administrative and judicial supervision of assessors' methods result in assessments of the Property which bear no relationship to market conditions, which eviscerate Petitioner's statutory J51 benefits, and which violate due process and equal protection standards.

Without uniform standards assessors, Tax Commissioners, and judges make subjective, hypothetical, and unpredictable determinations of assessment values. Assessments on the same property vary widely depending on which theories are used and what information and assumptions are taken into account. This system of guesswork, based on unstated and unreviewable theories and models, makes each of Respondent's more than 400 assessors a law unto himself, for all practical purposes unaffected by any statute, regulation, constitution or case law.

In an Article 7 proceeding, the Court will not consider any issue until the taxpayer submits detailed financial and operating information for the property for each year in dispute. The parties must also exchange appraisals and reports of sales of comparable properties, and the Tax Commission

can audit the taxpayer's books and records. N.Y. Supreme Court Civil Rule §202.60(b)(1), (c), (d), (g), and (h). None of this information has any bearing on the legality or constitutionality of the assessor's methods.

Despite Petitioner's fundamental due process right to a hearing to question government administrators whose determinations take Petitioner's property, *Goldberg v. Kelly*, 397 U.S. 254, 269-271 (1970), Petitioner cannot question or cross-examine assessors about their methods or the grounds of their determinations in an Article 7 Proceeding or any other administrative or legal proceeding. The assessor is not even bound by the outcome of such a proceeding in making future assessments. *Hilton v. Fahrenkopf*, 279 N.Y. 49, 52-53, 17 N.E. 2d 765, 766 (1938).

A tax system which relies upon property-by-property, year-by-year, and case-by-case administrative and judicial proceedings to determine each taxpayer's portion of the tax burden cannot substitute for a tax system which allocates the tax burden in accordance with reviewable standards. The present litigation-based system violates due process by permitting subjective, theoretical, and unpredictable assessment values limited only by the imagination of individual assessors.

Owners of small low-rent buildings are particularly prejudiced by this system because they cannot afford to bring repeated administrative and legal proceedings and because the uncertainty as to their tax burden is a continuing disincentive to invest in building improvements. This unreasonable system results in disparate taxation in which large and wealthy property owners who can afford attorneys and accountants can challenge assessments effectively while owners of small buildings with low rents are without any practical recourse.

The integrity of any system of taxation rests upon the premise that similarly-situated taxpayers pay the same share of the tax burden. Enabling assessors to impose illegal and excessive taxes on vulnerable owners without accountability, leading to seizure of properties *en masse* in many City neighborhoods for nonpayment, invidiously discriminates against such owners, resulting in such gross disparities in fact that the tax system violates equal protection of the laws. *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343-346 (1989).

The issue in this case is not the value which might be derived from review of detailed financial and operating information or from a *de novo* trial but whether the Respondent uses methods which are legal and constitutional. An Article 7 Proceeding to determine the market value of the Property for 1993-94 assessment purposes would neither address nor remedy this issue.

B. The Decision Conflicts With The Supremacy Clause Of The United States Constitution and Rulings Of This Court Which Require State Courts To Entertain §1983 Proceedings.

The Tax Injunction Act (28 U.S.C. §1341) compelled Petitioner to bring these federal claims in state court. Yet the decision in this case deprives Petitioner of state remedies which are plain, speedy, and efficient as required by said Act or plain, adequate, and complete as required by principles of comity. *Fair Assessment In Real Estate Assn. v. McNary*. 454 U.S. 100, 116 and FN8 (1981).

This case relegates Petitioner to an Article 7 Proceeding, which will not decide constitutional issues, because Petitioner is challenging a specific assessment. The

1987 Proceeding denied Petitioner standing to raise constitutional issues because Petitioner was not challenging a specific assessment. These two decisions deprive Petitioner of any legal recourse for Respondent's institutionalized abuses of the assessment process and insulate Respondent's assessors from challenges to the constitutionality of their methods.

New York cannot cloak Respondent or its assessors with immunity from judicial review when their methods violate federal statutes and constitutional protections. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-691 (1978); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 245-246 (Brandeis, J.) (1931).

The supremacy of federal law under Article VI, Clause 2 of the United States Constitution requires New York to enforce an owner's right to redress under 42 U.S.C. §1983. State procedures, defenses, and rules which prevent enforcement of the federal civil rights law cannot prevail over an owner's right to enforce such law in state court. *Felder v. Casey*, 487 U.S. 131, 150-153 (1988).

POINT II. THE STATE COURT DECISION CONFLICTS WITH RULINGS OF THIS COURT BY GIVING *RES JUDICATA* EFFECT TO A PRIOR STATE PROCEEDING WHICH DID NOT PROVIDE A REAL OPPORTUNITY TO PRESENT PETITIONER'S CONSTITUTIONAL CLAIMS.

Res judicata and collateral estoppel only apply if claims and issues have been actually litigated and determined on their merits in a prior proceeding. The language of a judgment is not necessarily dispositive but must be construed in connection with the matters actually presented and

adjudicated. *Vicksburg v. Henson*, 231 U.S. 259, 268-269 (1913).

The only matter put in issue and actually litigated with respect to Petitioner's constitutional claims in the 1987 Proceeding was whether they should be dismissed for mootness and lack of standing. The constitutional issues were not presented to the Court for determination on their merits, and the Court's denial of them was purely gratuitous. The Court confirmed that lack of standing determined the claims when it denied Petitioner's motion to reargue dismissal despite new evidence supporting Petitioner's claims of unconstitutionality and revealing that Respondent had made fraudulent misrepresentations about its procedures in the proceeding.

Claims dismissed for reasons which do not go to their merits are not *res judicata*. *Swift v. McPherson*, 232 U.S. 51, 55-56 (1914). Determination of a claim must have been necessary to the judgment in a prior proceeding in order for *res judicata* to apply. *Block v. Commissioners*, 99 U.S. 686, 693 (1878). A Court's denial of claims already dismissed for lack of standing is not necessary to the judgment.

It is manifestly unjust to dismiss claims for lack of standing, preventing the claimant from presenting proof, and then to rule on their merits to the claimant's prejudice. *Res judicata* should not apply if state procedures did not provide due process, which requires that the claimant have a real opportunity to present the case and be heard on the merits. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 482-485, *reh. den.*, 458 U.S. 1133 (1982); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680-682 (Brandeis, J.) (1930).

The 1987 Proceeding did not provide a full and fair hearing on Petitioner's constitutional claims. Issue on the

claims was not joined. There was no motion on the merits, no discovery or proof on the issues, no hearing on the merits, and no decision addressing the merits based in fact or law. The State Supreme Court's denial of Petitioner's motion to reopen the proceeding and examine the constitutional claims based on critical new evidence because of Petitioner's lack of standing itself negates any argument that Petitioner had a full and fair hearing.

The Appellate Division decision in the 1987 Proceeding was not expressly or by necessary implication based on constitutional grounds. The decision affirmed the dismissal for lack of standing as well as the judgment and did not rule on the denial of reargument. Under such circumstances, the constitutional issues cannot be said to have been directly or necessarily involved in the decision. *Matter of Hayhorn v. Carroll*, 225 N.Y. 84, 87-88, 121 N.E. 463, 464 (1918).

Since Petitioner was entitled to appeal as of right to the Court of Appeals under CPLR §5601(b)(1) if the judgment in the 1987 Proceeding finally determined Petitioner's constitutional claims, the Court's denial of permission to appeal under CPLR §5602(a)(1)(i) negates the argument that the proceeding finally determined the claims or that Petitioner had a full and fair hearing. *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 297-298, 169 N.E. 386, 390-391 (1929) (Cardozo, Ch. J).

Although Petitioner raised substantive constitutional issues concerning Respondent's assessment procedures and attempted to litigate them in the 1987 Proceeding, no court gave any legal authority for dismissing or denying them other than the State Supreme Court's reliance on *Abrams v. New York City Transit Authority*, 48 A.D. 2d 69, 70, 368 N.Y.S. 2d 165, 166 (1st Dept. 1975), *aff'd*, 39 N.Y. 2d 990, 355 N.E. 2d

289 (1976), which authorized dismissal for lack of standing alone. The Court's reasons for denying the claims are vague or non-existent. Neither of the appeals courts adverted to the constitutional claims.

Before denying a party the right to a second day in court on claims and issues allegedly determined in a prior proceeding, a court must ensure that the party had a first day in court to litigate them. Petitioner did not have an opportunity to litigate Petitioner's constitutional claims on their merits in the 1987 Proceeding -- not at the trial level where such claims were summarily dismissed for lack of standing, not on appeal to the Appellate Division where such dismissal was summarily affirmed without opinion, and not in the Court of Appeals where Petitioner's application to appeal was summarily denied.

In any event, Respondent is estopped to argue that Petitioner's constitutional claims were determined in the 1987 Proceeding. Respondent successfully moved to have Petitioner's constitutional claims dismissed for lack of standing before consideration on their merits and consistently argued through the appeal process that lack of standing was dispositive of the claims. Having benefitted from this argument to prevent substantive consideration of the claims, Respondent cannot now assert to Petitioner's prejudice that the claims were considered on their merits. *Davis v. Wakelee*, 156 U.S. 680, 689-691 (1895).

Petitioner did not pursue Petitioner's constitutional claims to this Court when denied permission to appeal to the Court of Appeals in the 1987 Proceeding because the denial was consistent with the lack of standing propounded by Respondent throughout. Respondent's adoption now of a position completely at odds with its stance in the 1987

Proceeding is a fraud designed to deprive Petitioner of any fair hearing on the claims.

Finally, even if Petitioner's constitutional claims were deemed to have been determined in the 1987 Proceeding, such determination would not bar the claims in this proceeding because the claims in this proceeding are based on different facts and new legal rights which did not exist when the 1987 Proceeding was litigated.

First, Petitioner's challenge to the 1993-94 assessment gives Petitioner standing to pursue the claims which was found lacking in the 1987 Proceeding.

Second, the 1987 Proceeding took place before Petitioner qualified for benefits under the J51 Program. The failure of Respondent's assessors to explain assessment increases for purposes of RPTL §489.9 and Respondent's maintenance of inconsistent and inadequate assessment records with respect to J51 properties provide new legal grounds for Petitioner's due process claims.

Third, Respondent's repeated increases of the assessment of the Property without explanation or justification since 1990 after Tax Commission reductions and Respondent's agreement to assessment values in the Stipulation add significantly to Petitioner's constitutional claims.

These new facts and legal circumstances give new weight and direction to Petitioner's constitutional claims which preclude *res judicata* or collateral estoppel effect from the 1987 Proceeding. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326-329 (1955); *Commissioner v. Sunnen*, 333 U.S. 591, 597-602 (1948).

CONCLUSION

The decision below does not rest on a fair and substantial basis but evades constitutional issues which should be determined on their merits.

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to review the decision and order of the New York State Supreme Court Appellate Division, First Department.

Respectfully submitted,

Barbara Kraebel D/B/A
Barklee Realty Company
Petitioner *pro se*
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

December 26, 1995

APPENDIX A

OPINION AND ORDER OF NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT ENTERED JULY 6, 1995 (WITH NOTICE OF ENTRY)

Sullivan, J.P., Rosenberger, Ross, Asch, Tom, JJ.

55415-
55416 In re Application of Barbara Kraebel, etc.,

Petitioner-Appellant, Pro Se

For a Judgment, etc.,

-against-

The New York City Department of Finance,

Respondent-Respondent. P.H. Azarian

Judgment, Supreme Court, New York County (Stuart Cohen, J.) entered February 7, 1994, which granted respondent's motion to dismiss this article 78 petition seeking, inter alia, a reduction of the real estate tax assessment on petitioner's property, and order, same court and Justice, entered April 11, 1994, which, insofar as appealable, denied petitioner's motion to vacate the above judgment pursuant to CPLR 5015(a)(2) and (3), unanimously affirmed, without costs.

The proceeding was properly dismissed on the ground that petitioner's exclusive remedy for the reduced tax

assessment she seeks is a certiorari proceeding under RPTL article 7 (Kahal Bnei Emunim v Town of Fallsburg, 78 NY2d 194, 204). Petitioner's claim that respondent's assessment methods understate the exemptions he is entitled to under the J-51 program is not a challenge to the method employed in the assessment of several properties, but rather to an overassessment of a specific property that necessarily involved the mental observations and judgment of individual assessors in placing a value on petitioner's improvement costs (see, Matter of Board of Mgrs. of Greens of North Hills Condominium v Board of Assessors, 202 AD2d 417, 419-420, lv denied 83 NY2d 757). "[I]n the absence of any legally mandated criteria, it is within the expertise and discretion of the Commissioner of Finance to ascertain fair market value" (78 S. First St. Hous. Dev. Fund Corp. v. Crotty, 150 AD2d 218, 222 (Milonas, J., dissenting), revd on dissenting memo, 75 NY2d 194). Also properly dismissed, on the ground of res judicata, was petitioner's claim alleging violation of her due process and equal protection rights and seeking to compel respondent to implement uniform, reasonable and predictable assessment standards, the parties and issues concerning such assessment standards being identical to those in a previous article 78 proceeding (147 AD2d 994; see, O'Brien v City of Syracuse, 54 NY2d 353). Contrary to petitioner's contention, the previous proceeding did adjudicate her constitutional claims on the merits.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 6, 1995

/s/ Catherine O'Hagan Wolfe
CLERK

PLEASE TAKE NOTICE that the within is a copy of an order which was duly entered and filed in the office of the Clerk of the Appellate Division, First Department, on July 6, 1995.

Dated: New York, N.Y.
July 10, 1995

PAUL A. CROTTY
Corporation Counsel
Attorney for Respondent-Respondent
100 Church Street
New York, New York 10007
Tel.: (212) 788-0429

TO: Barbara Kraebel, Esq.
Attorney Pro-se
60 East 42nd Street #1146
New York, New York 10165
Tel. (212) 831-1012

APPENDIX B

OPINION AND ORDER OF THE NEW YORK STATE COURT OF APPEALS ENTERED SEPTEMBER 26, 1995

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of September 1995

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 1277 SSD 80

In the Matter of Barbara Kraebel, &c.,
Appellant,

- v.-

The New York City Department of Finance,
Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, insofar as taken from that part of the Appellate Division order which affirmed the order of Supreme Court denying appellant's motion to vacate or reargue the prior Supreme Court judgment, be and the

same hereby is dismissed, without costs, by the Court sua sponte, upon the ground that that portion of the order does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the appeal, insofar as taken from the remainder of the Appellate Division order, be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX C

DECISION AND JUDGMENT OF NEW YORK STATE SUPREME COURT, NEW YORK COUNTY, ENTERED FEBRUARY 7, 1994 (WITH NOTICE OF ENTRY)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PART 54

PRESENT: Hon. STUART C. COHEN
Justice.

Barklee Realty, : INDEX NUMBER 115163-93

- against - : MOTION DATE 11-5-93

NYC Dept. Of Finance : MOTION SEQ. NO. 01, 02

: TRIAL CALENDAR NO. __

The following papers numbered 1 to 13 read on this motion to DISMISS

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits, Petition	1-3, 4-5
Answering Affidavits - Exhibits Cross-motion	6-8
Replying Affidavits	9, 10-11, 12-13

Appendix C

Upon the foregoing papers it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM
DECISION

SUPREME COURT
STATE OF NEW YORK
RECEIVED
[Date illegible]
I.A.S. MOTION
SUPPORT OFFICE

Dated 12-7-93

/signature/
J.S.C.
STUART C. COHEN

Appendix C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 54

----------x

BARKLEE REALTY COMPANY,
Petitioner,

- against - Index No.
115163

THE NEW YORK CITY
DEPARTMENT OF FINANCE,
Respondent.

----------x

JUSTICE STUART C. COHEN:

Petitioner Barklee Realty Company commenced this CPLR Article 78 proceeding seeking a judgment reducing the real estate tax assessment on its property and continuing said reduced assessment while petitioner's tax benefits under the J51 Program are in effect and until the adoption of a uniform predictable method of assessing petitioner's property.

Respondent moves to dismiss the petition on various grounds. The first ground alleges that Barklee Realty Company is a trade name and, therefore, petitioner lacks capacity to sue. Petitioner, however, cross-moves to amend the name of petitioner to Barbara Kraebel d/b/a Barklee Realty Company and respondent does not oppose said cross-motion. Accordingly, the portion of the motion seeking dismissal on the ground of lack of capacity to sue is denied and the cross-motion to amend the petition is granted.

Respondent also seeks dismissal of the portion of the petition seeking a reduced tax assessment on the ground that petitioner's exclusive remedy is a proceeding under Article 7

of the Real Property Tax Law. This portion of the motion is granted.

Challenges to real property assessments which allege that the assessment is "excessive, unequal or unlawful or that the real property is misclassified" (RPTL 706) normally must be asserted in a certiorari proceeding pursuant to Article 7 of the Real Property Tax Law. Such a proceeding is the taxpayers' exclusive remedy by which instances of illegality, overvaluation or inequality as to assessments may be asserted (Kahal Bnei v. Fallsburg, 78 NY2d 194, 204). Therefore, petitioner's challenge to the excessiveness of an assessment, including the claim that it is entitled to tax benefits under the J51 Program, must be brought in a proceeding under RPTL Article 7.

Respondent also seeks to dismiss the second cause of action, which seeks to require respondent to adopt and implement reasonable, equitable, uniform and predictable assessment standards. Respondent alleges that the cause of action is barred by res judicata and collateral estoppel. This portion of the motion is granted.

The proof submitted demonstrates that petitioner commenced an Article 78 proceeding in 1987 seeking to require respondent to implement uniform standards and procedures for assessment of property, alleging that the current procedures violate petitioner' due process and equal protection rights. The Court dismissed the petition and such dismissal was affirmed by the Appellate Division (147 AD2d 994).

Since the parties and the issues concerning the assessment practices and procedures in the two proceedings are identical, the determination in the prior proceeding

precludes any religation [*sic*] of this issue. Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (O'Brien v. City of Syracuse, 54 NY2d 353).

Accordingly, the petition is dismissed.

This constitutes the decision and judgment of the Court.

Dated: Dec. 7. 1993

/signature/
J.S.C.
STUART C. COHEN

Appendix C

Sir: - Please take notice that the within is a true copy of a decision and judgment duly entered in the office of the clerk of the within named court on February 7, 1994.

Dated, March 17, 1994

Yours, etc.,

Barbara Kraebel
Petitioner pro se

Office and Post Office Address

60 East 42nd Street - #1146
New York, NY 10165
Telephone: (212) 831-1012

To:

Paul A. Crotty
Corporation Counsel of the City of New York
Attorney(s) for Respondent

APPENDIX D

ORDER OF NEW YORK STATE SUPREME COURT, NEW YORK COUNTY, ENTERED APRIL 11, 1994, DENYING REARGUMENT OF DISMISSAL (WITH NOTICE OF ENTRY)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY PART 54

PRESENT: Hon. STUART C. COHEN
Justice.

Barbara Kraebel d/b/a
Barklee Realty Company, : INDEX NUMBER 115163/93

- against - : MOTION DATE _____

NYC Dept. of Finance : MOTION SEQ. NO._____

: TRIAL CALENDAR NO.

The following papers numbered 1 to _____ read on this motion to _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	_____
Answering Affidavits - Exhibits	_____
Replying Affidavits	_____

Appendix D

Upon the foregoing papers it is ordered that this motion by petitioner to vacate this Court's December 7, 1993 decision and judgment or for reargument, is denied. The proof submitted does not warrant the relief requested. As the Court previously held, petitioner's exclusive remedy is a proceeding pursuant to Article 7 of the Real Property Law [*sic*].

FILED
APR 11 1994
COUNTY CLERK'S OFFICE
NEW YORK

Dated 3-31-94 /signature/
J.S.C.

.....

Sir:-Please take notice that the within is a true copy of an order duly entered in the office of the clerk of the within named court on April 11, 1994

Dated, May 27, 1994

Yours, etc.,

Barbara Kraebel
Petitioner pro se

Office and Post Office Address

60 East 42nd Street - #1146
New York, NY 10165
Telephone: (212) 831-1012

To Paul A. Crotty
Corporation Counsel of the City of New York
Attorney(s) for Respondent

APPENDIX E

ORDER OF NEW YORK STATE SUPREME COURT, NEW YORK COUNTY, ENTERED AUGUST 11, 1987 DISMISSING CLAIMS FOR LACK OF STANDING IN THE 1987 PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK
INDIVIDUAL ASSIGNMENT PART 7
at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007.

PRESENT: Hon. LOUIS GROSSMAN
Justice.

Barklee Realty Company, :INDEX NUMBER 9465/86 [*sic*]

- against - :IAS PART
PAPERS SUBMITTED
New York City Dept. of Finance, :AUG 6 1987

---:

The following papers numbered 1 to _____ read on this motion, _____

PAPERS NUMBERED

No. ___ on Calendar of _____

Notice of Motion - Order to Show Cause - and Affidavits Annexed _____

Appendix E

Answering Affidavit _____

Replying Affidavit _____

_____ Affidavit _____

_____ Affidavit _____

Pleadings - Exhibit _____

Stipulation - Referee's Report - Minutes _____

Filed Papers _____

Upon the foregoing papers this Motion is decided in accordance with accompanying memorandum decision.

FILED
AUG 11 1987
COUNTY CLERK'S OFFICE
NEW YORK

Dated 8/4/87

/signature/
J.S.C.
LOUIS GROSSMAN

Appendix E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

In the Matter of
BARKLEE REALTY COMPANY,
Petitioner,

For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules — Index No. 9465/87

- against -

NEW YORK CITY DEPARTMENT OF FINANCE,
Respondent.

----------x

GROSSMAN, J.:

Motions 48 and 55 of June 25, 1987 are combined for disposition.

In this Article 78 proceeding petitioner, Barklee Realty, seeks relief under the Freedom of Information Act (FOIL) and injunctive and declaratory relief against the real property assessment system of the City of New York. Further petitioner challenges the constitutionality of Real Property Tax Law Sec. 305. Respondent moves, pursuant to CPLR 7804(f) to dismiss the amended petition for mootness and lack of standing, and petitioner cross-moves for summary judgment.

In April, 1985 petitioner purchased a sixteen-unit apartment building known as 205 West 147th Street, Manhattan. From 1982-83 to 1986/87 the tax assessment on

the property was $16,000. In January 1987 it quadrupled to $65,000 despite the fact that the property underwent no physical improvement nor were there substantial changes in the income it generated.

Petitioner wrote to respondent pursuant to FOIL requesting certain information concerning assessment of the property for the years 1981 through 1987 and was dissatisfied with the completeness of the documentation received pursuant to the FOIL request after commencement of this proceeding. Meanwhile petitioner applied to and received a complete rollback of the increase on April 28, 1987 from the New York City Tax Commission.

Petitioner's January 16, 1987 FOIL request sought:

1. Copies of all written documents and memoranda prepared or used in connection with the assessment of the property for fiscal years 1981/82, 1982/83, 1983/84, 1984/85, 1985/86, 1986/87 and 1987/88, including notes and reports of all public officers and staff involved in the determination of the assessments.

2. Copies of all codes and regulations of the Department of Finance or other governmental authorities setting forth assessment procedures and policies to be followed by assessment officers and the Tax Commission and Department of Finance in making assessments in the City of New York for fiscal years 1986/87 and 1987/88.

While the City contends that it has been fully responsive to the petitioner's request, the Court disagrees. It does not appear that the respondent has attempted to comply with the request for written procedures and guidelines utilized

by individual assessors when a property assessment is made. In this case, petitioner has requested these very directives that were used by the assessor who quadrupled the assessment of the subject premises. Therefore, respondent's motion to dismiss the FOIL claim is denied.

Petitioner's standing to sue is governed by the First Department decision in Abrams v. New York City Transit Authority, 48 A.D. 2d 69, 70 in which the court stated:

> It is settled law that a petitioner making a general attack on legislative or administrative action or inaction must demonstrate special damages distinct from that suffered by the public at large. (Hidley v. Rockefeller, 28 N.Y. 2d 439; Posner v. Rockefeller, 26 N.Y. 2d 970) ... Thus in determining whether there is 'standing to sue', it must be shown that petitioner's personal or property rights will be directly and specifically affected.

Since petitioner achieved a complete rollback of the proposed increase in assessment, it can demonstrate no specific and particularized injury in fact and lacks standing to sue. In fact, it may be argued that the assessment reduction itself demonstrates that the real property taxation system can and does respond to taxpayer needs.

Petitioner's reliance on Wein v. City of New York, 47 A.D. 2d 367, mod. 36 N.Y. 2d 610 is misplaced. As the court stated, "...[A] taxpayer's action for declaratory judgment brought pursuant to section 51 of the General Municipal Law is a separate and distinct statutory remedy from declaratory judgment actions in general ... [It] authorizes actions against public officials 'to prevent any illegal official act ... or to prevent waste or injury to, or to restore and make good, any

property, funds or estate [of the city.]'" Since here petitioner has filed under Article 78, section 51 standing requirements do not pertain.

Thus, respondent's motion pursuant to CPLR 7804(f) to dismiss the amended petition for lack of standing is granted with respect to petitioner's challenge to the constitutionality of Real Property Tax Law Sec. 305 and with respect to petitioner's claims for declaratory and injunctive relief. Since summary judgment is inappropriate in an Article 78 proceeding, plaintiff's cross-motion is denied.

The City is granted thirty days to answer that part of the Article 78 proceeding regarding the FOIL request. That petition will be added to the calendar of September 24, 1987.

The foregoing constitutes the decision and order of the Court.

DATED: August 4, 1987

/signature/
J.S.C.
LOUIS GROSSMAN

FILED
AUG 11 1987
COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX F

ORDER AND DECISION OF NEW YORK STATE SUPREME COURT, NEW YORK COUNTY, ENTERED JANUARY 6, 1988 DISMISSING PETITION IN THE 1987 PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK
INDIVIDUAL ASSIGNMENT PART 7
at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007.

PRESENT: Hon. LOUIS GROSSMAN
Justice.

Barklee Realty Co.	:	INDEX NUMBER 9465/87
- against -	:	IAS PART PAPERS SUBMITTED
N.Y.C. Dept. of Finance	:	JAN 4 1988

---:

The following papers numbered 1 to _____ read on this motion, _____

No. 15 on Calendar of 12-3-87

	PAPERSNUMBERED
Notice of Motion - Order to Show Cause - and Affidavits Annexed	1-2
Answering Affidavit	3

Appendix F

Replying Affidavit _____

_____ Affidavit _____

_____ Affidavit _____

Pleadings - Exhibit 4

Stipulation - Referee's Report - Minutes _____

Filed Papers _____

Upon the foregoing papers this Motion is decided in accordance with accompanying memorandum decision.

FILED
JAN 08 1988
N.Y. CO. CLK'S OFFICE

Dated 12/21/87 /signature/

J.S.C.

Appendix F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7

----------x

In the Matter of
BARKLEE REALTY COMPANY,
Petitioner,

Index No.
9465/87

For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules

- against -

NEW YORK CITY DEPARTMENT OF FINANCE,
Respondent.

----------x

LOUIS GROSSMAN, J.:

This Article 78 proceeding seeks various relief from the respondent. The relief sought in item 1 of the amended petition for respondent to comply with petitioner's Freedom Information Law request is denied as it appears that respondent has provided copies of all written documents of procedures and guidelines for assessors.

That part of the petition, item 2, to require respondent to promulgate, publish and implement uniform standards and procedures of the assessment and equalization of the assessment of petitioner' property, subject to approval by this Court is denied. Petitioner has not established that respondent is required by law to establish the procedures sought.

Appendix F

That part of the petition for a declaratory judgment to declare that Real Property Tax Law 305 which permitted respondent to utilize the method of assessment in effect in 1981 as violative of petitioner's due process of law and equal protection of law rights under the New York State Constitution and the other relief is denied. Also, see, my order August 4, 1987.

Accordingly, the amended petition is dismissed.

DATED: December 21, 1987 /signature/

J.S.C.

APPENDIX G

ORDER OF NEW YORK STATE SUPREME COURT, NEW YORK COUNTY, ENTERED DECEMBER 13, 1988 DENYING REARGUMENT OF DISMISSAL IN THE 1987 PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY PART 7

PRESENT: Hon. CHARLES E. RAMOS
Justice.

In Re: Barklee Realty Co., : INDEX NUMBER 9465-87

- against - : MOTION DATE 12/1/88

N.Y.C. Dept. of Finance : MOTION SEQ. NO. 006

: TRIAL CALENDAR NO. 57 on 12/5

The following papers numbered 1 to 7 read on this motion to VACATE ORDER

	PAPERS NUMBERED
Notice of Motion/Order To Show Cause - Affidavits - Exhibits A + Serv.	1-4
Answering Affidavits - Exhibits + Serv.	5-7

Appendix G

Replying Affidavits _____

Upon the foregoing papers it is ordered that this motion is denied. This matter was resolved in the petitioner's [*sic*] favor prior to the order of Mr. Justice Grossman dated 12/21/87 which dismissed this proceeding.

This shall constitute the order of this Court.

FILED
DEC 13 1988
COUNTY CLERK'S OFFICE
NEW YORK

Dated 12-5-88 /signature/
J.S.C.

APPENDIX H

ORDER OF NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, ENTERED FEBRUARY 23, 1989 IN THE 1987 PROCEEDING

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 23, 1989.

Present -- Hon. David Ross Justice Presiding
John Carro
E. Leo Milonas
Ernest H. Rosenberger
Betty Weinberg Ellerin Justices.

----------x

In the Matter of the Application of
Barklee Realty Company,
Petitioner-Appellant,

For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules 36121-22

- against -

New York City Department of Finance,
Respondent-Respondent.

----------x

Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis Grossman, J.), entered on August 11,

1987, and from a judgment of said court entered on January 6, 1988,

And said appeals having been argued by Barbara Kraebel, of counsel for the appellant, and by Reed G. Schneider, of counsel for the respondent; and due deliberation having been had thereon

If is unanimously ordered that the order and judgment so appealed from be and the same hereby are affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

APPENDIX I

ORDER OF NEW YORK STATE COURT OF APPEALS ENTERED JANUARY 4, 1990 IN THE 1987 PROCEEDING

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of January, A.D. 1990

Present, HON. SOL WACHTLER, Chief Judge, presiding.

1-10 Mo. No. 1321
In the Matter of Barklee Realty Company,
Appellant,

v.

New York City Department of Finance,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the same motion be and the same hereby is denied.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX J

PETITION DATED JUNE 15, 1993 (EXCERPTS)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART

- - - -

Appendix J

Petitioner, Barklee Realty Company, by its principal, Barbara Kraebel, appearing pro se, respectfully shows to this Court:

1. Petitioner is, and at all times relevant to this proceeding was, a proprietorship doing business under the laws of New York State. Petitioner's place of business is 60 East 42nd Street, #1146, New York, NY 10165.

2. Respondent New York City Department of Finance (Finance Department) is a New York City governmental agency, having its principal office at the Municipal Building, New York, New York 10007.

3. Upon information and belief, the Finance Department is the New York City governmental agency responsible for the assessment of real property in the City of New York.

FIRST CAUSE OF ACTION

.....

24. In May 1991, after a hearing and after Petitioner submitted numerous additional documents and information, the Tax Commission offered to reduce the 1991/92 assessment to $38,000, which Petitioner did not accept.

25. The Tax Commission gave no explanation for such reduced assessment.

26. Petitioner thereafter filed a Petition in the New York State Supreme Court for the County of New York (NYS Supreme Court) under Index No. 81192/91 for

certiorari review of the 1991/92 assessment under Real Property Tax Law (RPTL) Article 7.

.....

33. In April 1992, after a hearing, the Tax Commission offered to reduce the 1992/93 assessment to $38,000, which Petitioner did not accept.

34. The Tax Commission gave no explanation for such reduced assessment.

35. Petitioner thereafter filed a Petition in the NYS Supreme Court under Index No. 59958/92 for certiorari review of the 1992/93 assessment under RPTL Article 7.

.....

38. In December 1992, the Finance Department and the Petitioner entered into a Stipulation of Settlement of an Article 78 proceeding (described hereinafter) in NYS Supreme Court (Stipulation of Settlement) whereby the assessments of the Property for 1991/92 and 1992/93 were each reduced to $19,500, of which $3,500 was exempt under the J51 Program.

.....

52. In June and August 1988 Petitioner had applied to the New York City Department of Housing Preservation and Development (HPD) for real estate tax benefits for the Property pursuant to a program under RPTL Section 489 and Section 11-243 of the New York City Administrative Code providing real estate tax abatements and exemptions to owners who make certain improvements to their properties (J51 Program).

53. In February 1990, HPD granted Petitioner both J51 tax exemption and tax abatement for $5,800 of such improvements and J51 tax abatement only for an additional $18,200 of such improvements.

54. In August 1992 Petitioner brought an Article 78 proceeding in NYS Supreme Court against HPD and the Finance Department under Index No. 22026/92 contesting among other things the denial of additional tax abatements and the denial of tax exemption on the bulk of the work approved for tax abatement under the J51 Program.

55. In December 1992, HPD, the Finance Department and Petitioner entered into the Stipulation of Settlement of said proceeding, pursuant to which HPD granted J51 real estate tax abatements in the total sum of $26,780 on the Property and J51 tax exemption as to all of the work approved for tax abatement.

56. As discussed above, pursuant to the Stipulation of Settlement the Finance Department reduced the assessment on the Property to $19,500 for 1991/92 and 1992/93 and agreed that $3,500 of the assessments for 1991/92 and 1992/93 would be exempt from tax under the J51 Program.

57. Upon information and belief, applicable law prohibits the Finance Department from increasing the assessment on the Property while tax exemptions under the J51 Program are in effect unless there is either an increase in the value of the land or increase in the value of the building resulting from a substantial capital improvements not exempt from assessment under the J51 Program.

.....

62. Upon information and belief, the Finance Department does not have any procedures or standards to ensure that the taxable portions of assessments of properties with tax exemption under the J51 Program are not increased to cover the value of exempt improvements.

63. Petitioner submits that mandates of due process of law and equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 6 and 11 of Article I of the New York State Constitution require the Finance Department to adopt and implement reasonable, equitable, and uniform methods to ensure that the taxable portions of assessment of properties with tax exemption under the J51 Program are not increased to cover the value of exempt improvements.

64. Increased assessments without explanation or justification while benefits under the J51 Program are supposed to be in effect demonstrates either deliberate indifference to or reckless disregard for the right of Petitioner to the benefits under said Program under the aforesaid provisions of the United States and New York State Constitutions or intentional and deliberate violation of such right.

65. Based upon the foregoing, Petitioner requests this Court to order the Finance Department (i) to reduce the assessment on the Property to no more than $19,500 for 1993/94, $3,500 of which to be exempt under the J51 Program, and (ii) to continue said assessment and exemption on the Property, unless detailed and documented explanations for any increases permitted under the J51 Program are first provided to Petitioner, until the Property receives all of the benefits to which the Petitioner is currently entitled under the J51 Program.

Appendix J

SECOND CAUSE OF ACTION

.....

94. Section 305.1 of the RPTL permits the Finance Department to utilize the same methods in assessing real property in the City as were in effect in 1981.

95. Upon information and belief, there are not now, and there were not on the effective date of said Section, any uniform verifiable methods applied in assessing real property in the City of New York.

96. Upon information and belief, the assessment methods used by the Finance Department at present, and at the effective date of said Section have been non-uniform, unreasonable, subjective, arbitrary, and capricious.

97. Upon information and belief, some assessors, Tax Commission members and hearing officers, and courts use different criteria for assessing New York City real property than others.

98. Upon information and belief, the Finance Department has approximately 400 assessors making assessment determinations without public scrutiny and without ascertainable standards to ensure equitable and uniform treatment.

99. Upon information and belief, the Tax Commission has numerous members and hearing officers reviewing assessments without public scrutiny and without ascertainable standards to ensure equitable and uniform treatment.

100. As indicated above, assessors and Tax Commission hearing officers make summary determinations of property values without providing factual or legal explanations which would enable owners to challenge the bases of these determinations and permit administrative or legal review under objective criteria.

101. Instead of a rational assessment system which would resolve questions of value by objective criteria, the current system permits resolution of such questions only through tax certiorari proceedings under RPTL Article 7 in which owners must establish the value of properties de novo.

102. Upon information and belief, determinations of value on a case-by-case basis in tax certiorari proceedings are not only too expensive, complex, and time-consuming for owners of small low-rent buildings like the Property but they impose inevitable inequities and lack of uniformity because the original lack of assessment standards renders judicial review as subjective and unpredictable as the original assessments.

103. In addition to all of the information already supplied to the Finance Department in RPIEs and Tax Commission applications, owners cannot pursue tax certiorari proceedings until they submit a nine-page Real Estate Tax Audit Report which requires detailed information on income, expenses, and book values which Petitioner does not maintain in the form required in the normal course of business, which requires in some cases detailed information from historical records, and which takes substantial time and effort to assemble.

104. Because of the low rents at the Property, Petitioner cannot afford to hire administrative assistants,

attorneys, accountants, and appraisers to prepare RPIEs and Tax Commission applications, assemble detailed financial and other information required each year in order to contest assessments, and prosecute repeated administrative and legal proceedings in order to obtain reasonable assessments of the Property.

105. As a result, Petitioner has been compelled to perform all of the foregoing services year and year without receiving any compensation and, notwithstanding such repetitious administrative and legal burdens, without having any assurance that the Property's assessment in future years will be any more rational and equitable than the assessments of the past.

106. Since the Finance Department has repeatedly increased the assessment on the Property and manipulated the land and building values without explanation or justification in the past, Petitioner must assume that the it will continue such practices in the future.

107. Since Petitioner cannot predict with any reasonable accuracy what the real estate taxes on the Property will be from year to year and cannot rely on administrative and legal remedies which are themselves onerous, inequitable, and unpredictable, it is commercially-unreasonable for Petitioner to make capital investments in the Property and impossible to plan rationally for its economic viability.

108. Upon information and belief, assessment of real property in New York City is deemed to be an "art" to be applied by each assessor artist in accordance with his training and capabilities largely unrestrained by equitable, objective and uniform criteria.

109. Petitioner submits that mandates of due process of law, equal protection of the laws, and just compensation for government taking of property under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 6, 7 and 11 of Article I of the New York State Constitution require the Finance Department to adopt and implement reasonable, equitable, uniform, and predictable assessment standards to replace such "art" so that owners are not compelled to bring repeated administrative and legal appeals and so that Petitioner and other owners of small low-rent properties are not driven out of business and their properties confiscated on account of ultimately uncollectible real property taxes.

110. Petitioner and owners of other comparable small low-income rent-regulated properties have neither the economic resources nor the political influence to prevent the misapplication and abuse inherent in the "artistic" approach to real estate tax liability.

111. Such "artistic" approach to tax liability unreasonably interferes with and threatens Petitioner's ownership interest in the Property.

112. The Finance Department's continued use of non-uniform and unverifiable methods to assess the Property and the resultant ad hoc, irrational, and unjustified assessments unfounded in the actual physical and economic condition of the Property is unreasonable, arbitrary, capricious, fraudulent and an abuse of administrative discretion.

113. The Finance Department's failure to adopt and implement uniform verifiable standards and procedures for assessing real property in New York City and determining challenges to such assessments demonstrates either a

deliberate indifference to or reckless disregard for the right of Petitioner to an objective tax assessment system under the aforesaid provisions of the United States and New York State constitutions or intentionally and deliberately violates such right.

114. To the extent that RPTL Section 305.1 authorizes the Finance Department's assessment methodologies and "artistic" approach to tax liability, said Section violates Petitioner's right to an objective tax assessment system under the aforesaid provisions of the United States and New York State Constitutions.

115. Based upon the foregoing, Petitioner requests that this Court order the Finance Department to reduce the assessment on the Property for 1993/94 to no more than $19,500 and continue said assessment on the Property for future years until adoption and implementation of a rational, equitable and predictable method for assessing the Property.

SUMMATION

116. Unless the requested relief is granted, Petitioner is and will be aggrieved and injured because Petitioner will be required to operate the Property without the benefits under the J51 Program to which Petitioner is entitled and because Petitioner will continue to be subject to unreasonable and unconstitutional real estate assessment practices.

117. Four months have not elapsed since the actions of the Finance Department complained of herein.

118. Except for the NYS Supreme Court proceedings referred to herein, which were settled without prejudice to the claims in this proceeding, and except for an earlier NYS

Appendix J

Supreme Court proceeding under Index No. 9465/87, which was dismissed for lack of standing because Petitioner did not then have an outstanding challenge to a particular assessment, no previous application has been made for the relief sought herein.

119. Petitioner has no adequate remedy at law for the relief sought herein.

WHEREFORE, PETITIONER RESPECTFULLY REQUESTS:

1. That this Court order the Finance Department to reduce the assessment on the Property to no more than $19,500 for 1993/94, $3,500 of which to be exempt under the J51 Program;

2. That this Court order the Finance Department to continue said assessment and exemption on the Property, unless detailed and documented explanations for any increases permitted under the J51 Program are first provided to Petitioner, until the Property receives all of the benefits to which Petitioner is currently entitled under the J51 Program;

3. That this Court order the Finance Department to reduce the assessment on the Property for 1993/94 to no more than $19,500 and continue said assessment on the Property for future years until adoption and implementation of a rational, equitable and predictable method for assessing the Property; and

4. That this Court order such other and further relief as this Court deems appropriate or as the nature of the proceeding requires.

Appendix J

Dated: New York, New York
June 15, 1993

/s/ Barbara Kraebel

Barbara Kraebel
Petitioner pro se
Barklee Realty Company
60 East 42nd St. - #1146
New York, NY 10165

Telephone: (212) 831-1012

APPENDIX K

PETITIONER'S AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS PETITION DATED SEPTEMBER 13, 1993 (EXCERPTS)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

- - - -

Appendix K

AFFIDAVIT IN OPPOSITION TO MOTION
TO DISMISS THE PETITION

Index No. 115163/93
Assigned: Justice Stuart C. Cohen

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Barbara Kraebel deposes and says:

1. I am Petitioner pro se in this proceeding, and I respectfully submit this affidavit in opposition to the Defendants' motion dated August 20, 1993 to dismiss the Petition.

2. I am personally familiar with all of the pleadings and proceedings herein and with the facts bearing upon said motion.

.....

RPTL ARTICLE 7 REMEDIES

.....

21. Petitioner submits that the cases and statutes Respondents cite in Resp. Aff. to support its contention that RPTL Article 7 is the sole recourse for Petitioner's objections to Respondent's assessment methodologies are distinguishable from this case.

22. RPTL Article 7 provides a process for appealing specific assessments on a property for a specific year by determining the value and the equalization rate to be applied thereto in a trial de novo in which the assessor's methodology is not examined or relevant.

23. Indeed, in New York County the Tax Commission, rather than the Respondent, is the defending party in an RPTL Article 7 proceeding.

24. Pursuant to New York Supreme Court Civil Rule (Civil Rule) 202.60(b)(1) and (c), the Court will not address any issues in such a proceeding until the taxpayer prepares and submits to the Court and to the attorneys for the Tax Commission a Real Estate Tax Audit Report Form containing detailed financial and operating information for the property for the year or years in question.

25. Civil Rule 202.60(d) mandates an audit of the taxpayer's books and records, and Civil Rule 202.60(g) requires the exchange of appraisal and sales reports in order to pursue such proceedings.

26. The foregoing procedures are inappropriate and unduly burdensome in the context of this proceeding because Petitioner is not simply challenging the amounts of Petitioner's 1993/94 assessment and J51 exemption.

27. In this proceeding Petitioner is challenging Respondent's authority and jurisdiction to increase the assessment on the Property in violation of J51 statutes and to assess the Property without adequate statutory standards and administrative procedures.

29. The issue in this proceeding is not the appraised value which might result from review of detailed financial and operating information or from a de novo trial but the legality and constitutionality of Respondent's assessment methodologies and the adequacy and fairness of administrative and judicial appeal mechanisms to challenge assessments so derived, including such mechanisms under RPTL Article 7 itself.

29. Petitioner maintains that RPTL Sec. 489.9 precludes Respondent from increasing the assessment on the Property while benefits under the J51 Program are in effect except upon proof of conditions that meet the statutory criteria for such increases.

30. Petitioner further maintains that constitutional mandates of due process of law, equal protection of the laws, and just compensation for taking of property preclude imposition of taxes on the Property except under statutory standards and administrative procedures sufficiently precise to enable taxpayers, assessors, the Tax Commission and the Courts to determine taxes rationally, fairly and consistently without the repetitious, burdensome and essentially subjective administrative and legal proceedings currently utilized.

31. Petitioner particularly objects to the property-by-property, year-by-year, and case-by-case assessment proceedings contemplated by RPTL Article 7 because this ad hoc system discriminates against Petitioner and other owners of small rent-regulated properties in low-income neighborhoods for whom annual assessment proceedings impose prohibitive expense and disproportionate legal complications.

32. RPTL Article 7 relief would not address these objections to the assessment process nor provide Petitioner with relief from continuing assessment abuses.

33. Petitioner submits that this proceeding is like cases in which Article 78 proceedings were deemed appropriate because general principles of law and the use of illegal methods of assessment, rather than computations of value, were the issues in controversy. Hewlett Assocs. v. City of New York, 57 NY 2d 356, 364-5 (1982); Troy Towers Redevelopment Co. Inc. v. City of Troy, 51 AD 2d 173 (3d Dept. 1976), aff'd 41 NY 2d 816; Park Place Coop. v. Board of Assessors, 102 AD 2d 893 (2d Dept. 1984).

34. Petitioner also invokes federal law (42 U.S.C. Sec. 1983), which grants Petitioner a right to bring constitutional claims against Respondent that is not satisfied by an RPTL Article 7 proceeding against the Tax Commission.

35. Based upon the foregoing, the Respondent's motion to dismiss the Petition because of remedies available under RPTL Article 7 should be denied.

RES JUDICATA AND COLLATERAL ESTOPPEL

36. In June 1987, Petitioner brought a proceeding against Respondent in New York State Supreme Court under Index No. 9465/1987 (1987 Proceeding) challenging Respondent's real property assessment procedures on constitutional grounds and seeking information concerning such procedures under the Freedom of Information Law (FOIL).

37. However, contrary to Respondent's contentions in Resp. Aff., the 1987 Proceeding did not dispose of any of Petitioner's constitutional claims.

38. Before litigation of any of said claims, Respondent moved to dismiss all of them for mootness and lack of standing. A copy of Respondent's Notice of said Motion (without attachments) is attached hereto as Exhibit B.

39. In said Motion Respondents argued, among other things, that Petitioner did not have standing to contest Respondent's assessment practices because, after Petitioner brought said Proceeding, Petitioner had accepted a Tax Commission offer to reduce the 1987/88 assessment on the Property, which was the only assessment of the Property then under challenge.

40. On this basis, the Court in the 1987 Proceeding, by decision and order entered August 11, 1987, dismissed all of Petitioner's challenges to Respondent's assessment practices and all relief sought in said Proceeding with respect thereto for lack of standing, relying on Abrams v. N.Y.C. Transit Authority, 48 AD 2d 69 (1st Dept. 1975), aff'd 39 NY 2d 990. A copy of said decision and order is attached hereto as Exhibit C.

41. The Court's dismissal of Petitioner's claims regarding Respondent's assessment practices left for resolution in the 1987 Proceeding only Petitioner's FOIL claims.

42. Respondent answered the allegations of the Petition in the 1987 Proceeding only as they pertained to Petitioner's FOIL claims. A copy of Respondent's Verified

Answer dated November 27, 1987 is attached hereto as Exhibit D.

43. In response to said Answer the Court issued the judgment, decision and order entered January 6, 1988 attached as Exh. 5 Resp. Aff.

44. Since by the Court's August 1987 order Petitioner's challenges to Respondent's assessment methods had already been dismissed for lack of standing and since issue on those claims was never joined, the Court's statements about Respondent's assessment procedures in the January 1988 judgment were obiter dicta not essential to the outcome and not dispositive of Plaintiff's constitutional claims.

45. Petitioner appealed both the August 1987 order and the January 1988 judgment to the Appellate Division.

46. Although Respondent in Resp. Aff. quotes Petitioner's description of the January 1988 judgment in Petitioner's Pre-Argument Statement to the Appellate Division, Respondent does not quote Petitioner's description of the August 1987 order in a prior paragraph of the same Statement, which reads as follows:

> By order entered in the Office of the Clerk of New York County on August 11, 1987 Judge Grossman dismissed all of Petitioner's claims except the Freedom of Information Law claim, finding that Petitioner had no standing to raise the dismissed claims...

47. The Appellate Division affirmed both the August 1987 order and the January 1988 judgment, 147 AD 2d 994 (1st Dept.), and the Court of Appeals denied leave to appeal,

75 NY 2d 702. Copies of the orders of said Courts are attached hereto as Exhibit E.

48. In its Affirmation In Opposition To Motion For Leave To Appeal dated October 27, 1989, Respondent confirmed to the Court of Appeals that Judge Grossman's denial of Petitioner's standing to pursue its constitutional claims was dispositive as to those claims and that they were never reviewed on their merits. A copy of said Affirmation is attached hereto as Exhibit F.

49. Petitioner submits that since issue was never joined on the constitutional issues which Petitioner raised in the 1987 Proceeding, and since those issues were not litigated, they are not res judicata in this proceeding nor do they provide a basis of collateral estoppel to prevent Petitioner from asserting constitutional claims in this proceeding.

50. Based upon the foregoing, the Respondent's motion to dismiss the Petition on the ground of res judicata or collateral estoppel should be denied.

PETITION STATES A CAUSE OF ACTION

51. Respondent's argument that Petitioner cannot challenge Respondent's assessment practices unless they violate a statute does not take into account Petitioner's claim that Respondent's assessment procedures violate RPTL Sec. 489.9, which prohibits Respondent from raising assessments on the Property unless there is an increase in the value of the

land or an increase in the value of the building attributable to an alteration or new construction.[1]

52. Respondent's argument that Petitioner cannot challenge Respondent's assessment practices unless they violate a statute also does not take into account the constitutional basis for Petitioner's challenge -- whose essence is the inadequacy of existing statutes and regulations under constitutional mandates -- and the remedies under Article 78 of the CPLR and Section 1983 of Article 42 of the United States Code to provide redress for such constitutional violations.

.....

WHEREFORE, PETITIONER RESPECTFULLY REQUESTS:

1. That this Court deny Defendants' motion to dismiss the Petition;

2. That this Court order Defendants to answer the Complaint within 30 days and grant Petitioner 15 days after receipt of Defendant's Answer to reply thereto; and

---

[1] Amendments to said statute effective after the Property qualified for J51 benefits d ffect the Property.

BEST AVAILABLE COPY

3. That this Court order such other and further relief as this Court deems appropriate or as the nature of the proceeding requires.

/s/ Barbara Kraebel
Barbara Kraebel
Petitioner pro se
Barklee Realty Company
60 East 42nd St. - #1146
New York, NY 10165

Telephone: (212) 831-1012

Sworn to before me this
13th day of September, 1993

/s/ Luis R. Ancel
Notary Public

Luis R. Ancel
Notary Public, State of New York
No. 31-5591635
Qualified in New York County
Commission Expires August 31, 1994
New York
New York

APPENDIX L

**NOTICE OF APPEAL
OF STATE SUPREME COURT DECISION
AND JUDGMENT ENTERED FEBRUARY 7, 1994,
WITH CIVIL APPEAL PRE-ARGUMENT STATEMENT
(WITHOUT ATTACHMENTS)**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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Appendix L

PLEASE TAKE NOTICE that the above-named Petitioner, Barbara Kraebel, d/b/a Barklee Realty Company, hereby appeals to the Appellate Division of the New York State Supreme Court, First Department, from a judgment entered in the above-entitled action in the office of the County Clerk of New York County on February 7, 1994 dismissing the Petition, and this appeal is taken from each and every part of said judgment as well as from the whole thereof.

Dated: March 9, 1994
New York, New York

Barbara Kraebel
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

TO:

Clerk of the County of New York (2)
60 Centre Street
New York, New York

Paul A. Crotty
Corporation Counsel of the
City of New York
100 Church Street - Rm. 5G27
New York, New York 10007
Attention: Norman Kapp, Esq.

The Honorable Oliver Koppell
Attorney General of the State of New York
120 Broadway - 25th floor
New York, New York

Appendix L

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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Appendix L

INDEX NUMBER:	115163/1993
PARTIES:	Barbara Kraebel d/b/a Barklee Realty Company (Petitioner) New York City Department of Finance (Respondent)
COURT AND COUNTY:	Supreme Court of the State of New York New York County: IAS Part 54
JUDGE:	Honorable Stuart C. Cohen
DATE OF ENTRY OF JUDGMENT:	February 7, 1994
DATE NOTICE OF APPEAL FILED:	March 11, 1994
DISPOSITION OF OTHER APPEALS:	Not applicable
DISPOSITION OF RELATED PROCEEDING:	Index No. 9465/1987 Related claims dismissed for lack of standing, aff'd Appellate Division, Second Judicial Department, permission to appeal denied, New York State Court of Appeals

Appendix L

Index No. 22026/92
Settled without determining and without prejudice to related claims.
Respondent has not fully complied with settlement requirements

NAMES OF COUNSEL:

For Petitioner-Appellant	Barbara Kraebel pro se 60 East 42nd Street - #1146 New York, New York 10165 Telephone: (212) 831-1012
For Respondent New York City Department of Finance	Paul A. Crotty Corporation Counsel of the City of New York 100 Church Street New York, New York 10007 Telephone: (212) 788-0438 Attention: Norman Kapp

Attached hereto and made a part hereof are copies of (i) the judgment entered in the New York County Clerk's office on February 7, 1994 and (ii) the Notice of Appeal of said judgment.

Appendix L

BRIEF DESCRIPTION OF NATURE OF THE CASE AND RESULT BELOW

Petitioner commenced this proceeding in June 1993 under Article 78 of the Civil Practice Law and Rules and Section 1983 of Article 42 of the United States Code to require Respondent to reduce the 1993/94 assessment on Petitioner's subject real property in New York County (Property); to continue such reduced assessment while Petitioner's real estate tax benefits under Real Property Tax Law Section 489 (J51 Program) are in effect; and to continue such reduced assessment until Respondent adopts and implements real property assessment standards that satisfy due process of law, equal protection of the laws, and just compensation standards under the Fifth and Fourteenth Amendments to the U.S. Constitution and Sections 6, 7, and 11 of Article I of the New York State Constitution.

Respondent moved to dismiss the Petition on the grounds that Petitioner was not a jural entity, that Real Property Tax Law Article 7 is the exclusive method for challenging real property tax assessments, and that Petitioner's claims that the assessment should be continued until adoption and implementation of Constitutionally-permissible assessment standards were barred by res judicata and collateral estoppel based on a case Petitioner brought in 1987 on some of the same grounds.

Petitioner opposed said motion and moved to amend the Petition to satisfy Respondent's objection to Petitioner's jural capacity.

By judgment entered in the aforesaid office on February 7, 1994, Judge Cohen dismissed the Petition on the

aforesaid Article 7, res judicata and collateral estoppel grounds but granted Petitioner's motion to amend the Petition and ordered that such amendment established Petitioner's capacity to bring the proceeding.

GROUNDS FOR REVERSAL, ANNULMENT OR MODIFICATION

(1) Real Property Tax Law Article 7 is not an adequate or appropriate means of determining Petitioner's claims that Respondent's assessment methods violate Petitioner's statutory rights under the J51 Program.

(2) Real Property Tax Law Article 7 is not an adequate or appropriate means of determining Petitioner's claims that Respondent's assessment methods violate Petitioner's constitutional rights with respect to the J51 Program.

(3) A prior case does not bar Petitioner's claims by res judicata or collateral estoppel because said claims were summarily dismissed in the prior case on the ground that Petitioner lacked standing, whereas Petitioner does have standing in this proceeding.

(4) A prior case does not bar Petitioner's claims by res judicata or collateral estoppel because the judgment and judicial review as to those claims in the prior case did not determine them on their merits.

(5) Respondent's arguments and representations to the courts in the prior case that Petitioner's claims were barred by lack of standing estop Respondent to assert in this proceeding that such claims were determined on their merits.

Appendix L

ISSUES PROPOSED TO BE RAISED ON APPEAL

(1) Whether Real Property Tax Law Article 7 is an adequate or appropriate method to redress Respondent's institutionalized procedures for assessing a property in violation of statutory mandates under the J51 Program.

(2) Whether Real Property Tax Law Article 7 is an adequate or appropriate means of determining Petitioner's constitutional claims regarding Respondent's assessment practices under the J51 Program.

(3) Whether dismissal of a cause of action for lack of Petitioner's standing in a prior proceeding bars Petitioner from prosecuting a later cause of action on similar grounds when Petitioner does have standing.

(4) Whether dismissal of a cause of action without a determination and judicial review on the merits in a prior proceeding bars Petitioner from prosecuting a later cause of action on similar grounds.

(5) Whether Respondent is estopped to argue that claims were determined in a prior proceeding when Respondent prevailed in its arguments in the prior proceeding and on appeal that the claims could not be considered on their merits because of Petitioner's lack of standing.

Dated: March 9, 1994
New York, New York

Barbara Kraebel
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

Appendix L

TO:

Clerk of the County of New York
60 Centre Street
New York, New York

Paul A. Crotty
Corporation Counsel of the
City of New York
100 Church Street - Rm. 5G27
New York, New York 10007
Attention: Norman Kapp, Esq.

The Honorable Oliver Koppell
Attorney General of the State of New York
120 Broadway - 25th floor
New York, New York

APPENDIX M

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO VACATE DECISION AND REARGUE DISMISSAL (EXCERPTS)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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Appendix M

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO VACATE DECISION AND JUDGMENT AND TO REARGUE RESPONDENT'S MOTION TO DISMISS THE PETITION

Index No. 115163/93
Assigned: Justice Stuart C. Cohen

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Barbara Kraebel deposes and says the following:

1. I am Petitioner pro se in this proceeding, and I respectfully submit this affidavit in support of Petitioner's Motions To Vacate This Court's Decision and Judgment And To Reargue Respondent's Motion To Dismiss The Petition.

2. I am personally familiar with all of the pleadings and proceedings herein and with the facts bearing upon said motion.

3. This proceeding was commenced in June 1993 by service of a Petition and Notice of Petition.

4. By the attached decision and judgment dated December 7, 1993 this Court granted Respondent's motion to dismiss the Petition on the grounds that a proceeding against the Tax Commission under Article 7 of the Real Property Tax Law is the only way to challenge a real property assessment and that the second cause of action was barred by res judicata and collateral estoppel.

5. Petitioner respectfully requests this Court to vacate said decision and judgment and to order reargument of said motion on the grounds of newly-discovered evidence, fraud, misrepresentation and misconduct in Respondent's submissions, and in the interests of justice.

.....

8. Petitioner also learned that in fact the Respondent maintains two sets of assessment records with respect to the Property -- one for J51 purposes and one for assessment purposes -- and that the assessors' records do not include all necessary information from the J51 records.

.....

12. On February 7, Petitioner received from Respondent a Notice of the 1994/95 assessment of the Property dated January 14, 1994, a copy of which is attached hereto as Exhibit F.

13. Said Notice does not disclose the 1994/95 breakdown of the assessment between land and building, information which is crucial in determining whether the assessment complies with the J51 statutes.

14. The foregoing computer printouts and Notice of 1994/95 assessment demonstrate that the assessor of the Property does not have accurate information with respect to the J51 exemption status of the Property upon which to base accurate and legal assessments.

.....

18. Exhibit D shows that the assessor did not amend his records to show the J51 exemption commencing in 1991/92 but only showed such exemption commencing in 1993/94 after the assessor had more than doubled the assessment in violation of J51 statutes.

.....

22. Exhibit F shows that the estimated taxes on the Property for 1994/95 will be $2,737.

23. Since under RPTL Sec. 489.2(a)(1) and corresponding J51 regulations the maximum J51 annual abatement of such taxes is approximately $2,230 (8 1/3% of the $26,780 Certified Reasonable Cost of the J51 improvements), Petitioner will be required to make a tax payment of approximately $500 for 1994/95 even though under the J51 statutes, all real estate taxes on the Property should be exempt or abated.

24. As increases in transitional assessments in future years phase in more of the 1993/94 assessment increase, Petitioner will be required to make larger tax payments in violation of the J51 statutes.

25. This Court's decision and judgment would require Petitioner to bring annual challenges and legal proceedings to appeal each assessment even though Respondent's wrongful manipulation of assessment amounts and J51 exemption dates and Respondent's maintenance of two sets of assessment records based on different facts and figures are defeating all of Petitioner's statutory benefits under the J51 Program and requiring repeated challenges to assessments that are unlawful, contrary to Respondent's sworn statements, and in violation of the Stipulation ordered by this Court.

26. Annual appeals of assessment amounts under RPTL Article 7 are not an adequate or appropriate remedy for such institutionalized abuses of the assessment process.

27. In addition, Petitioner respectfully notes that the decision to bar Petitioner's second cause of action by res judicata and collateral estoppel is inconsistent with Petitioner's right to a full and fair hearing and judicial review of such claims.

28. Petitioner's constitutional claims were summarily dismissed for lack of standing in the prior proceeding, Respondent never answered the claims, and they were not submitted for consideration to the Court nor determined on their merits, despite language in the Judgment that suggests the contrary.

29. The only determination essential to the outcome of the claims in the prior proceeding was that Petitioner did not have standing to prosecute them because Petitioner had settled Petitioner's only pending challenge to a real property assessment.

30. On appeal Petitioner sought standing to raise the claims despite such lack of a pending challenge and on the basis of the Judgment's implication of substantive review of the claims, but Petitioner never obtained such standing; the Appellate Division affirmed the Supreme Court's Order denying standing and the Court of Appeals did not review the Appellate Division's decision.

31. Had Petitioner's constitutional claims been determined on their merits, Petitioner's appeal to the New York State Court of Appeals would have been accepted "as of right" under CPLR Sec. 5601(b) whereas in fact the appeal

was denied without comment by Order issued January 4, 1990, a copy of which is attached hereto as Exhibit G.

32. Respondent is estopped to assert that the claims were determined in the prior proceeding because Respondent prevailed in its assertions in the prior proceeding and on appeal that the claims should not be considered on their merits because of Petitioner's lack of standing.

33. The present proceeding arose from Respondent's failure to assess the Property in accordance with J51 statutes which did not apply to the Property when the prior proceeding was brought.

34. Petitioner's claims with respect to the J51 statutes arose with the 1991/92 assessment of the Property, which, together with the 1992/93 assessment, were settled by the Stipulation referred to in Par. 6 above.

35. Petitioner brought this proceeding when Respondent continued to assess the Property in violation of the J51 statutes with the 1993/94 assessment.

36. Since Petitioner's challenge to the 1993/94 assessment has not been settled, Petitioner has standing to prosecute the claims in this proceeding.

37. These new facts and circumstances, and the repeated administrative and legal appeals they generate, give new weight to Petitioner's claims that Respondent's assessment standards and the review processes therefor are not acceptable under constitutional standards.

38. These new legal circumstances, the lack of substantive review and determination of Petitioner's claims in

the prior proceeding, and the ambiguous legal setting in which the claims were litigated in the prior proceeding should preclude res judicata or collateral estoppel effect. Restatement (Second) of Judgments, Sec. 20 (2) and note k, Sec. 27 and notes d, f and h, Sec. 28(1), (2)(b), (4), (5)(c) and notes a, c, f, and j (1980); 73 N.Y. Jur 2d Judgments Secs. 323, 338, 342, 343 and 364 and cases cited (1988).

39. Petitioner respectfully notes that this Court has misconstrued Petitioner's second cause of action to require Respondent to adopt and implement assessment standards which satisfy Petitioner's constitutional objections, whereas said cause of action seeks solely to preclude Respondent from raising the assessment of the Property.

.....

WHEREFORE, PETITIONER RESPECTFULLY REQUESTS:

1. That this Court vacate this Court's decision and judgment dated December 7, 1993,

2. That this Court order reargument of Respondent's Motion To Dismiss the Petition based upon the foregoing newly-discovered evidence, upon Respondent's fraud, misrepresentation, and misconduct in its submissions in support of said Motion, and in the interests of justice, and

3. That this Court order such other and further relief as this Court deems appropriate or as the nature of the proceeding requires.

/s/ Barbara Kraebel
Barbara Kraebel
Petitioner pro se
Barklee Realty Company
60 East 42nd St. - #1146
New York, NY 10165

Telephone: (212) 831-1012

New York
New York

Sworn to before me this
10 day of March, 1994.

/s/ Luis Ancel
Notary Public

Luis R. Ancel
Notary Public, State of New York
No. 31-5591635
Qualified in New York County
Commission Expires August 31, 1994

APPENDIX N

**NOTICE OF APPEAL
OF ORDER ENTERED APRIL 11, 1994
DENYING REARGUMENT OF DISMISSAL,
WITH CIVIL APPEAL PRE-ARGUMENT STATEMENT
(WITHOUT ATTACHMENTS)**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

- - - -

Appendix N

PLEASE TAKE NOTICE that the above-named Petitioner, Barbara Kraebel, d/b/a Barklee Realty Company, hereby appeals to the Appellate Division of the New York State Supreme Court, First Department, from an order entered in the above-entitled action in the office of the County Clerk of New York County on April 11, 1994 denying Petitioner's motion to vacate the Decision and Judgment and to reargue Respondent's Motion To Dismiss The Petition, and this appeal is taken from each and every part of said order as well as from the whole thereof.

Dated: May 27, 1994
New York, New York

Barbara Kraebel
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

TO:

Clerk of the County of New York (2)
60 Centre Street
New York, New York

Paul A. Crotty
Corporation Counsel of the
City of New York
100 Church Street - Rm. 5G27
New York, New York 10007
Attention: Norman Kapp, Esq.

The Honorable Oliver Koppell
Attorney General of the State of New York
120 Broadway - 25th floor
New York, New York

Appendix N

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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Appendix N

INDEX NUMBER:	115163/1993
PARTIES:	Barbara Kraebel d/b/a Barklee Realty Company (Petitioner) New York City Department of Finance (Respondent)
COURT AND COUNTY:	Supreme Court of the State of New York New York County: IAS Part 54
JUDGE:	Honorable Stuart C. Cohen
DATE OF ENTRY OF ORDER:	April 11, 1994
DATE NOTICE OF APPEAL FILED:	May 27, 1994
DISPOSITION OF OTHER APPEALS:	Appeal of Decision and Judgment Pending in the Appellate Division
DISPOSITION OF RELATED PROCEEDING:	Index No. 9465/1987 Related claims dismissed for lack of standing, aff'd Appellate Division, Second Judicial Department, permission to appeal denied, New York State Court of Appeals

Appendix N

Index No. 22026/92
Settled without determining and without prejudice to related claims.
Respondent has not fully complied with settlement requirements.

NAMES OF COUNSEL:

For Petitioner-Appellant	Barbara Kraebel pro se 60 East 42nd Street - #1146 New York, New York 10165 Telephone: (212) 831-1012
For Respondent New York City Department of Finance	Paul A. Crotty Corporation Counsel of City of New York 100 Church Street New York, New York 10007 Telephone: (212) 788-0438 Attention: Norman Kapp

Attached hereto and made a part hereof are copies of (i) the order entered in the New York County Clerk's office on April 11, 1994 and (ii) the Notice of Appeal of said order.

BRIEF DESCRIPTION OF NATURE OF THE CASE AND RESULT BELOW

Petitioner commenced this proceeding in June 1993 under Article 78 of the Civil Practice Law and Rules and Section 1983 of Article 42 of the United States Code to require Respondent to reduce the 1993/94 assessment on

Petitioner's subject real property in New York County (Property); to continue such reduced assessment while Petitioner's real estate tax benefits under Real Property Tax Law Section 489 (J51 Program) are in effect; and to continue such reduced assessment until Respondent adopts and implements real property assessment standards that satisfy due process of law, equal protection of the laws, and just compensation standards under the Fifth and Fourteenth Amendments to the U.S. Constitution and Sections 6, 7, and 11 of Article I of the New York State Constitution.

Respondent moved to dismiss the Petition on the grounds that Petitioner was not a jural entity, that Real Property Tax Law Article 7 is the exclusive method for challenging real property tax assessments, and that Petitioner's claims that the assessment should be continued until adoption and implementation of Constitutionally-permissible assessment standards were barred by res judicata and collateral estoppel based on a case Petitioner brought in 1987 on some of the same grounds.

Petitioner opposed said motion and moved to amend the Petition to satisfy Respondent's objection to Petitioner's jural capacity.

By judgment entered in the aforesaid office on February 7, 1994, Judge Cohen dismissed the Petition on the aforesaid Article 7, res judicata and collateral estoppel grounds but granted Petitioner's motion to amend the Petition and ordered that such amendment established Petitioner's capacity to bring the proceeding.

Petitioner filed a Notice of Appeal of said judgment and decision to the Appellate Division, First Department.

Petitioner moved in Supreme Court, New York County, to vacate the foregoing decision and judgment and to reargue Respondent's motion to dismiss based on newly-discovered evidence, fraud, misrepresentation and misconduct of Respondent, and in the interests of justice. Respondent did not respond to said motion. Judge Cohen denied said motion by order entered in the New York County Clerk's office on April 11, 1994 on the ground that Petitioner's proof in support of the motion was inadequate and that Petitioner's exclusive remedy is a proceeding under Article 7 of the Real Property Tax Law.

GROUNDS FOR REVERSAL, ANNULMENT OR MODIFICATION

(1) Real Property Tax Law Article 7 is not an adequate or appropriate means of determining Petitioner's claim that Respondent's methods of keeping assessment records violate Petitioner's statutory rights under the J51 Program.

(2) Real Property Tax Law Article 7 is not an adequate or appropriate means of determining Petitioner's claim that Respondent's methods of keeping assessment records violate Petitioner's constitutional rights with respect to the J51 Program.

(3) A prior case does not bar Petitioner's claims by res judicata or collateral estoppel because Petitioner did not have a full and fair hearing on said claims.

(4) A prior case does not bar Petitioner's claims by res judicata or collateral estoppel because new facts and circumstances giving rise to new legal relationships not

applicable in the prior proceeding give rise to new grounds for Petitioner's claims in this proceeding.

ISSUES PROPOSED TO BE RAISED ON APPEAL

(1) Whether Real Property Tax Law Article 7 is an adequate or appropriate method to redress Respondent's repeated erroneous determinations of Petitioner's J51 benefits occurring because Respondent keeps two sets of assessment records relating to J51 properties and includes incorrect information regarding such benefits in the set used by the assessors.

(2) Whether dismissal of Petitioner's constitutional causes of action in a prior proceeding bars Petitioner from prosecuting a later cause of action on similar grounds when the New York Court of Appeals denied Petitioner's right to appeal said dismissal.

(3) Whether dismissal of Petitioner's causes of action in a prior proceeding bars Petitioner from prosecuting a later cause of action on similar grounds when new facts and circumstances give rise to new legal relationships give rise to new grounds for such causes of action.

Dated: May 27, 1994
New York, New York

Barbara Kraebel
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

Appendix N

TO:

Clerk of the County of New York
60 Centre Street
New York, New York

Paul A. Crotty
Corporation Counsel of the
City of New York
100 Church Street - Rm. 5G27
New York, New York 10007
Attention: Norman Kapp, Esq.

The Honorable Oliver Koppell
Attorney General of the State of New York
120 Broadway - 25th floor
New York, New York

APPENDIX O

**NOTICE OF APPEAL AS OF RIGHT
OF DECISION OF
APPELLATE DIVISION, FIRST DEPARTMENT
ENTERED JULY 6, 1995
(WITHOUT ATTACHMENTS)**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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Appendix O

NOTICE OF APPEAL

New York County
Index No. 115163/93

PLEASE TAKE NOTICE that, pursuant to §5601(b)(1) of the Civil Practice Law and Rules, the above-named Petitioner, Barbara Kraebel, d/b/a Barklee Realty Company, hereby appeals to the New York State Court of Appeals from an order in the above-entitled action entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on July 6, 1995 unanimously affirming (i) a decision, order and judgment of the Supreme Court, New York County, entered in the office of the County Clerk of New York County on February 7, 1994 dismissing the Petition, and (ii) an order of the Supreme Court, New York County, entered in the office of the County Clerk of New York County on April 11, 1994 denying Petitioner's motion to vacate said decision, order and judgment and to reargue Respondent's motion to dismiss the Petition. Said order of the Appellate Division finally determines this proceeding and directly involves the construction of Sections 6, 7, and 11 of Article I of the New York State Constitution and the Fifth and Fourteenth Amendment of the United States Constitution; and this appeal is taken from each and every part of said order as well as from the whole thereof.

Dated: August 8, 1995
New York, New York

Barbara Kraebel
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

Appendix O

TO:

Clerk of the County of New York (2)
60 Centre Street
New York, New York

Paul A. Crotty
Corporation Counsel of the City of New York
Attorney for Respondent
100 Church Street - 4th floor
New York, New York

The Honorable Dennis C. Vacco
Attorney General of the State of New York
120 Broadway - 25th floor
New York, New York

APPENDIX P

APPELLANT'S JURISDICTIONAL STATEMENT TO NEW YORK STATE COURT OF APPEALS DATED AUGUST 15, 1995 (WITHOUT ATTACHMENTS)

COURT OF APPEALS
STATE OF NEW YORK

- - - -

Appendix P

1. The title of the proceeding is as set forth above.

2. Petitioner appeals to the Court of Appeals from order of the Appellate Division, First Judicial Department entered July 6, 1995 unanimously affirming (i) a decision, order and judgment of the Supreme Court, New York County entered February 7, 1994 dismissing the Petition and (ii) an order of the Supreme Court, New York County entered April 11, 1994 denying Petitioner's motion to vacate said decision, order and judgment and to reargue Respondent's motion to dismiss the Petition.

3. Petitioner's Notice of Appeal was filed in the office of the Clerk of New York County on August 8, 1995, and a copy thereof was served by hand on August 8, 1995 on Respondent's attorney at the address set forth in Par. 5 below. A copy of the Notice of Appeal was also served by hand on August 8, 1995 on The Honorable Dennis C. Vacco, Attorney General of the State of New York, 120 Broadway - 24th floor, New York, New York, who has not appeared in this proceeding.

4. On July 11, 1995 Respondent served Petitioner by mail with appealed from Order entered July 6, 1995 with Notice of Entry.

5. The address of the attorney for Respondent is as follows:

Paul A. Crotty
Corporation Counsel of the City of New York
100 Church Street - 4th floor
New York, New York 10007

6. Attached hereto and made a part hereof are copies of (i) Notice of Appeal to this Court dated August 8, 1995 (Exhibit A), (ii) appealed from order of Appellate Division, First Department entered July 6, 1995 (Exhibit B), (iii) decision, order and judgment of the Supreme Court, New York County entered February 7, 1994 (Exhibit C), and (iv) order of the Supreme Court, New York County entered April 11, 1994 (Exhibit D). Except as set forth therein, there were no opinions or formal or informal findings or conclusions issued with respect to the aforesaid judicial determinations.

BASIS OF COURT OF APPEALS JURISDICTION

7. The basis of Court of Appeals jurisdiction is CPLR Section 5601(b)(1), in that the Appellate Division order finally determines the proceeding and directly involves the construction of the due process, equal protection of the laws, and takings clauses of Sections 6, 7 and 11 of Article I of the New York State Constitution and the Fifth and Fourteenth Amendment of the United States Constitution.

8. The decision below dismisses Petitioner's constitutional and legal claims that Respondent's assessment methodologies prevent Petitioner from obtaining tax benefits to which Petitioner is entitled under the so-called J51 Program. Instead, the decision relegates Petitioner to a proceeding under Article 7 of the Real Property Tax Law to determine the assessment of Petitioner' property de novo without addressing or remedying such claims.

9. The decision below also dismisses Petitioner's general constitutional challenge to Respondent's assessment methodologies by res judicata and collateral estoppel based on a decision in Barklee Realty Company v. New York City Dept. of Finance, 147 A.D. 2d 994 (1st Dept. 1989),

permission to appeal denied 75 N.Y. 2d 702 (1990) (herein referred to as the 1987 Proceeding), which involved some of the constitutional issues as to Respondent's real estate assessment methodologies raised in this proceeding.

10. In the 1987 Proceeding Petitioner's constitutional claims were dismissed summarily for lack of standing because Petitioner had settled the only pending appeal of an assessment of Petitioner's property. Said claims were not submitted to the trial court for disposition and were denied in the judgment without substantive factual or legal findings. Petitioner's subsequent motion to vacate the judgment to bring relevant new information on said claims to the trial court was denied because the claims had been dismissed for lack of standing.

11. Petitioner asserted on appeal in the 1987 Proceeding that Petitioner should have standing as a taxpayer to raise the constitutional claims but said standing was never granted. Instead, the Appellate Division summarily affirmed both the judgment and the order dismissing the claims for lack of standing without reconciling the inconsistency between the two. The Appellate Division did not rule on Petitioner's appeal of the denial of Petitioner's motion to reopen the proceeding. This Court denied Petitioner's application for permission to appeal without adverting to any constitutional issues or otherwise explaining its ruling.

12. Denial of claims which have not been fully litigated on their merits on factual findings and points of law cannot provide the basis for res judicata or collateral estoppel under Miller Mfg. Co. v. Zeiler, 45 N.Y. 2d 956, 958 (1978).

13. Gilberg v. Barbieri, 53 N.Y. 2d 285, 291-292 (1981), and Schwartz v. Public Administrator, 24 N.Y. 2d 65,

71-72 (1969), also preclude res judicata or collateral estoppel from barring Petitioner's constitutional claims because the resolution of constitutional issues was not necessary to the decision in the 1987 Proceeding and because Petitioner did not have a full and fair hearing on said issues in the 1987 Proceeding.

14. Since Petitioner could have appealed as of right under CPLR §5601(b)(1) if the decision in the 1987 Proceeding determined Petitioner's constitutional claims on their merits, this Court's denial of Petitioner's application for permission to appeal under CPLR §5602(a) without referring to said claims and without any other explanation negates the argument that said decision was a determination on the merits. See CPLR §5520(b) and Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 297-298 (1929) (Cardozo, Ch. J).

15. In addition, Houghton v. Thomas, 220 A.D. 415, 423 (1st Dept. 1927), aff'd, 248 N.Y. 523 (1928), precludes res judicata and collateral estoppel effect because Respondent's successful arguments in the 1987 Proceeding and representations to this Court that the claims were barred by lack of standing estop Respondent from arguing in this proceeding that the claims were determined on their merits.

16. Furthermore, the new claims involve factual and legal issues which arose after the 1987 Proceeding was decided. Such new issues include a continuing pattern of irrational assessment determinations, assessment methodologies which deprive Petitioner of tax benefits to which Petitioner is entitled under the J51 program, and inadequate and prejudicial assessment record-keeping which prevent Petitioner from obtaining such J51 benefits. These new bases for Petitioner's constitutional claims preclude res judicata or collateral estoppel effect under Booke v. Joy, 79

A.D. 2d 903 (1st Dept. 1981), confirmed on remand, 88 A.D. 2d 569 (1982).

17. An additional basis for Court of Appeals jurisdiction is 42 U.S.C. §1983, under which state courts have concurrent jurisdiction with federal courts over federal civil rights claims like those of Petitioner in this proceeding. Indeed, Fair Assessment In Real Estate Assn v. McNary, 454 U.S. 100, 116 and FN 8 (1981), precludes federal court jurisdiction over §1983 cases involving state tax issues based on 28 U.S.C. §1341 (Tax Injunction Act) if state remedies are plain, speedy and efficient, and on principles of comity if state remedies are plain, adequate and complete.

18. Consistent with such state court jurisdiction, Felder v. Casey, 487 U.S. 131, 150-153 (1988), requires state courts to protect the federal rights of claimants under 42 U.S.C. §1983 in the same manner as they would be protected in federal court. Accordingly, this court cannot relegate Petitioner to an Article 7 proceeding to determine Petitioner's federal claims with respect to assessments under the J51 Program because such proceedings would determine the assessment of Petitioner's property de novo without addressing or remedying such claims. Federal case law also precludes this court from denying Petitioner's federal claims based on res judicata or collateral estoppel for reasons set forth above.

19. In support of reversal by the Court of Appeals, Petitioner has urged and will urge the following points of law:

(1) This proceeding challenges methods of assessment that apply generally to all properties, not to Petitioner's property alone.

(2) Respondents' assessment methods and practices cannot be exempted from judicial review to determine their legality and constitutionality.

(3) Article 78, declaratory judgment, and federal Civil Rights Act proceedings, not Real Property Tax Law Article 7 proceedings, are the proper remedies when taxing authorities exceed their statutory jurisdiction or violate constitutional mandates.

(4) Real Property Tax Law Article 7 is not an adequate remedy for Respondent's assessment methods and record-keeping practices which violate Petitioner's statutory and constitutional rights because Respondent may not be a party and Respondent's methods and practices will not be subject to review in such a proceeding.

(5) Real Property Tax Law Article 7 is not an adequate remedy for Respondent's assessment methods and record-keeping practices which violate Petitioner's statutory and constitutional rights because such proceedings determine assessments for a particular year or years de novo under complex and costly procedures which are irrelevant to Petitioner's claims and which unreasonably discriminate against owners of small low-income properties like Petitioner.

(6) Real Property Tax Law Article 7 is not an adequate remedy for Respondent's assessment methods and record-keeping practices which violate Petitioner's statutory and constitutional rights because Respondent's assessors do not follow rulings in Article 7 proceedings in determining assessments for future years.

(7) The 1987 Proceeding does not bar Petitioner's claims that Respondent's assessment methods violate

Petitioner's state and federal constitutional rights by res judicata or collateral estoppel because constitutional claims in the 1987 Proceeding were summarily dismissed on the ground that Petitioner lacked standing, whereas Petitioner does have standing in this proceeding.

(8) The 1987 Proceeding does not bar Petitioner's constitutional claims by res judicata or collateral estoppel because constitutional claims in the 1987 Proceeding were not joined in pleadings or motions nor submitted to the trial court on their merits.

(9) The 1987 Proceeding does not bar Petitioner's constitutional claims by res judicata or collateral estoppel because constitutional claims in the 1987 Proceeding were not determined on their merits with support by findings of fact and conclusions of law.

(10) The 1987 Proceeding does not bar Petitioner's constitutional claims by res judicata or collateral estoppel because Petitioner did not have a full and fair hearing on constitutional claims.

(11) The 1987 Proceeding does not bar Petitioner's constitutional claims by res judicata or collateral estoppel because determination of Petitioner's constitutional claims was not necessary to the determination of said Proceeding.

(12) The 1987 Proceeding does not bar Petitioner's constitutional claims by res judicata or collateral estoppel because Respondent's successful arguments and representations to the courts that Petitioner's constitutional claims were barred by lack of standing estop Respondent to assert in this proceeding that such claims were determined on their merits.

Appendix P

(13) The 1987 Proceeding does not bar Petitioner's constitutional claims by res judicata or collateral estoppel because new facts and circumstances since said Proceeding have given rise to new legal relationships and new grounds for constitutional claims.

Dated: August 15, 1995
New York, New York

Barbara Kraebel
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

TO: Clerk of the Court (2 copies)
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Paul A. Crotty
Corporation Counsel of the City of New York
Attorney for Respondent
100 Church Street - 4th floor
New York, New York

The Honorable Dennis C. Vacco
Attorney General of the State of New York
120 Broadway - 24th floor
New York, New York

APPENDIX Q

APPELLANT'S LETTER TO NEW YORK STATE COURT OF APPEALS DATED SEPTEMBER 5, 1995 IN CONNECTION WITH *SUA SPONTE* REVIEW

BARKLEE REALTY COMPANY
60 East 42nd Street
Suite 1146
New York, New York 10165

Telephone: (212) 831-1012

September 5, 1995

Clerk of the Court
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

RE: M/O Kraebel d/b/a Barklee Realty Company
v. NYC Dept. of Finance

Dear Sir:

This letter is in support of subject matter jurisdiction on sua sponte review of Petitioner's appeal of Order of the Appellate Division, First Department entered July 6, 1995. Said Order finally determined the action by affirming decision, order, and judgment of the Supreme Court, New York County, entered February 7, 1994 dismissing the

Petition (R:15-18**). Upon review of said Order, the issues determined by State Supreme Court order entered April 11, 1994 denying Petitioner's motion to vacate the decision (R:21) which was affirmed by said Order of the Appellate Division, are also reviewable. Bogart v. County of Westchester, 295 N.Y. 934 (1946).

This proceeding challenges the constitutionality and legality of Respondent's assessment and record-keeping methods as they affect Petitioner's tax benefits under the so-called J51 Program and as they apply to Petitioner's subject property in general. Petitioner alleges that Respondent grants unfettered discretion to assessors to impose taxes on property owners without adequate guidelines to ensure fairness, uniformity, and compliance with statutory mandates. As a result, assessments of the Property have been repeatedly increased without apparent justification and in violation of Real Property Tax Law §489.9, necessitating annual administrative and legal appeal proceedings. Petition R:26-50; Petitioner's Affidavit In Opposition To Motion To Dismiss The Petition (Pet. Aff. Opp.) pars. 12-20, 51-52 (R:89-90, 96-97); Petitioner's Affidavit In Support Of Petitioner's Motions To Vacate Decision And Judgment And To Reargue Respondent's Motion To Dismiss The Petition (Pet. Aff. Vac.), pars. 6-26 and Exhs. A, B, C, D, E and F (R:201-205, 210-220). The inadequacy of administrative and legal review proceedings and their undue burden on owners of small buildings with low government-regulated rents are important aspects of Petitioner's constitutional claims. Pars. 16-19, 22-26, 31-35, 38-40, 46-47, and 97-113 of the Petition

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** Numbers after R: refer to pages in the Record on Appeal to the Appellate Division.

(R:28-47), pars. 21-35 of Pet. Opp. Aff. (R:90-93), and pars. 6-26 of Pet. Aff. Vac. (R:201-205).

The proceeding directly involves the construction of the due process, equal protection, and takings provisions of the Fifth and Fourteenth Amendments to the United States Constitution and of Sections 6, 7 and 11 of Article I of the New York State Constitution, which are specifically referred to in pars. 63-64, 109, and 113-114 of the Petition (R:35-36, 45-47), and are referred to by inference in pars. 28 (mislabelled 29 at the bottom of R:91), 30, 34, 49, and 52 of Pet. Aff. Opp. (R:91-93, 96-97, 113) and in par. 37 of Pet. Aff. Vac. (R:207).

Petitioner preserved Petitioner's constitutional claims on appeal to the Appellate Division in Petitioner's Notices of Appeal (R:13-21), Civil Appeal Pre-Argument Statements (R:1-12), and in Petitioner-Appellant's Brief and Reply Brief in the Appellate Division.

Although the Appellate Division purported to rule on Petitioner's claims on non-constitutional grounds, its rulings should be reviewed by this Court as of right because they necessarily rest on, directly involve and are inextricably linked to substantial constitutional issues which were decisive to the outcome. Cohen and Karger, Powers Of The New York Court Of Appeals, Rev. ed. 1992, §§55, 56, 57, and 59, pp. 253, 256-258, 268-274.

The determination that a tax certiorari proceeding under Article 7 of the Real Property Tax Law is the exclusive remedy for reducing a tax assessment necessarily involves denial of Petitioner's constitutional challenge to the adequacy of administrative and Article 7 proceedings to review Respondent's assessment methods. For Petitioner and other

small owners of low income properties, annual Tax Commission appeals and Article 7 proceedings to redetermine values established ab initio under Respondent's unreasonable and unreviewable methods are overwhelming and prejudicial burdens which provide no protection against overvaluation or the resulting confiscation of properties for nonpayment of excessive taxes.

An Article 7 proceeding is not a proper remedy in the present case because determining the fair market value of the subject property de novo for a specific year or years would be irrelevant to Petitioner's claims. An Article 7 proceeding would not review Respondent's assessment methods and practices nor assert any jurisdiction over Respondent or its assessors which would remedy their repeated and continuing violations of Petitioner's statutory and constitutional rights. Petitioner's claims require legal determinations as to the constitutionality of Respondent's methods, not factual determinations of value. The claims require examination of the methods and procedures which guide the assessors, not of the mental processes of individual assessors as to a specific property or year. Under New York law, an Article 78 or declaratory judgment proceeding is the proper vehicle for such claims. Hewlett Assocs. v. City of New York, 57 N.Y.2d 356, 364-365 (1982); Bloom v. Mayor, City of New York, 35 A.D. 2d 92, 95-97 (2d Dept. 1970), aff'd, 28 N.Y. 2d 952 (1971).

Merrick Holding Corp. v. Board Of Assessors, 45 N.Y.2d 538 (1978), does not preclude these claims. It analyzed the reasonable application of an assessment method which was essentially unchallenged. Merrick did not endorse methods of assessment so subjective and secret that they cannot be tested for reasonableness nor empower assessors to violate statutory rules, to consider irrelevant methods and

factors in determining assessments, to "equalize" properties with non-comparable properties, or to make appraisals without appropriate guidelines and accountability.

Under federal law, a declaratory judgment or Section 1983 proceeding in state court is a proper remedy for determining the constitutionality of state tax methods. Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428, 431-433 (2d Cir. 1981). The Court deferred to an ongoing Article 7 proceeding in LILCO's case on grounds of LILCO's competence to establish the complex valuation amounts and ratios required in such a proceeding and to cope with protracted delays caused by inefficient state court administration and legal maneuvering. Id. at 433. These same factors are among the reasons Article 7 proceedings unreasonably burden and prejudice owners of small low-rent properties.

The Appellate Division's determination that the 1987 Proceeding bars Petitioner's constitutional claims necessarily involves a determination that Petitioner's right to due process of law is not violated by giving res judicata or collateral estoppel effect to statements in the decision, order and judgment of the Supreme Court, New York County, entered January 6, 1988 (R:84-86) purporting to rule on the merits of constitutional claims concerning Respondent's assessment procedures which Petitioner brought in a prior proceeding under Index No. 9465/1987 (1987 Proceeding). This Court is not bound to accept this determination. The decisions in the 1987 Proceeding speak for themselves as to their meaning and effect. The State Supreme Court and the Appellate Division could and did reach their determinations in the 1987 Proceeding on independent non-constitutional grounds, i.e. Petitioner's lack of standing after settling Petitioner's only outstanding challenge to an assessment on

the subject property. The State Supreme Court dismissed Petitioner's constitutional claims for lack of standing in its order of August 11, 1987 (R:102-106) and confirmed said dismissal order in its judgment (R:86). The Appellate Division specifically affirmed said dismissal order before affirming the judgment (R:109). This Court denied permission to appeal without reference to Petitioner's constitutional claims (R:110). It is unreasonable to conclude that these courts determined constitutional claims on their merits after dismissal for lack of standing. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 521 (1949).

In the 1987 Proceeding Petitioner's constitutional claims were dismissed upon Respondent's motion and repeated arguments that Petitioner lacked standing to pursue them, the claims were not joined by motion or pleading nor submitted to the trial court for review on their merits, determination of the claims on their merits was not necessary to the judgment, the claims were not fully litigated or determined on the basis of factual or legal findings, and the claims were determined without a full and fair hearing, without considering on its merits Petitioner's motion to vacate based on new evidence of Respondent's fraudulent misrepresentations concerning its assessment procedures, and without permission to appeal to this Court.

Since the Appellate Division decision in the 1987 Proceeding and this Court's denial of permission to appeal were not expressly or by necessary implication based on constitutional grounds, the constitutional issues were not determined on their merits in said Proceeding. Cohen and Karger, supra, §§57, 59, pp. 258-260, 266-267. Lynch v. New York, 293 U.S. 52, 54-55 (1934); Matter of Haydorn v. Carroll, 225 N.Y. 84, 87-88 (1918). What is more, Petitioner's constitutional claims in this proceeding are supported by

substantial new factual and legal grounds not available at the time of the 1987 Proceeding, and these new grounds provide Petitioner with standing to pursue such claims. Pars. 36-50 and Exhs. B, C, D, E and F of Pet. Aff. Opp. (R:93-96, 100-113) and pars. 4-40 and Exhs. A, B, C, D, E, F and G of Pet. Aff. Vac. (R:201-221). Under these circumstances, the Appellate Division's determinations regarding the effect of the 1987 Proceeding directly and necessarily raise due process issues which this Court should address as of right. Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 131-132, cert. den., 278 U.S. 647 (1928).

The present decision violates federal law by exempting Respondent from constitutional scrutiny of its assessment methods and practices and precluding review and determination of Petitioner's constitutional claims on their merits. Howlett v. Rose, 496 U.S. 356, 367-372, 380-382 (1990). Requiring Petitioner to bring annual Tax Commission appeals and Article 7 proceedings to redetermine the assessment of the subject property de novo and giving res judicata or collateral estoppel effect to a non-dispositive prior proceeding in lieu of permitting Petitioner's direct constitutional challenge to Respondent's assessment methods unnecessarily burden Petitioner's federal claims and deny Petitioner substantial rights under federal law which the Supremacy Clause of the United States Constitution protect. Felder v. Casey, 487 U.S. 131, 150-153 (1988); Garrett v. Moore-McCormack Co., 317 U.S. 239, 245-246 (1942).

The decision below does not rest on a fair and substantial basis consistent either with applicable law or with Petitioner's constitutional rights. By preventing Petitioner from challenging the constitutionality of Respondent's assessment methods, the decision below evades constitutional issues which should be reviewed by this Court

on their merits. Cohen and Karger, supra, §59, p. 274; Broad River Co. v. So. Carolina, 281 U.S. 537, 540-541 (1930).

For the foregoing reasons, Petitioner respectfully requests that this Court accept this appeal as of right. If this Court does not determine that it has jurisdiction as of right, Petitioner respectfully requests permission to appeal under Art. 6 §3.b(6) of the New York State Constitution and CPLR §5602(a).1(i) because this proceeding involves significant issues of law which should be reviewed by this Court in the interests of substantial justice.

Sincerely yours,

Barbara Kraebel

BK:s

cc: Paul A. Crotty
Corporation Counsel of the City of New York
100 Church Street - 4th floor
New York, New York 10007

The Honorable Dennis C. Vacco
Attorney General of the State of New York
120 Broadway - 24th floor
New York, New York 10271

APPENDIX R

RESPONDENT'S NOTICE OF MOTION DATED JUNE 8, 1987 TO DISMISS THE PETITION FOR LACK OF STANDING IN THE 1987 PROCEEDING (WITHOUT ATTACHMENTS)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

- - - -

PLEASE TAKE NOTICE that, upon the affidavit of William K. Block, dated June 4, 1987, and the attached exhibits, and the petition, amended petition, and exhibits attached, respondent will move this court at IA Part 7, at the County Courthouse, 60 Centre Street, Room 540, New York, New York, on June 25, 1987, at 9:30 a.m., or as soon as counsel can be heard, for an order, pursuant to CPLR 7804(f), dismissing the amended petition for mootness and lack of standing, and for such other relief as may seem just.

The above entitled proceeding is for relief under the Freedom of Information Act and injunctive and declaratory relief against the real property assessment system of the City of New York and concerning the constitutionality of Real Property Tax Law §305.

Pursuant to the stipulation of the parties, responding papers, if any, must be served on or before June 22, 1987.

Dated: New York, New York
June 8, 1987

Yours, etc.

PETER L. ZIMROTH
Corporation Counsel
Attorney for Respondent
100 Church Street, Room 5G5
New York, New York 10007
Tel. (212) 566-0346

TO: BARBARA KRAEBEL
Attorney for Petitioner, Pro Se
60 East 42nd Street, Suite 411
New York, New York 10165
Tel. (212) 831-1012

APPENDIX S

RESPONDENT'S VERIFIED ANSWER DATED NOVEMBER 27, 1987 IN THE 1987 PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

- - - -

Appendix S

Respondent, by its attorney, Peter L. Zimroth, Corporation Counsel of the City of New York, as and for its answer to the amended petition insofar as it makes a claim pursuant to the Freedom of Information Law in paragraphs 1 through 3, 32 through 50, and 66 through 69:

1. Denies the allegations of paragraphs 43 through 50, inclusive, 67 and 69.

2. Denies the allegations of paragraph 37 and refers to the letter of William K. Block dated May 12, 1987 for its precise terms and the meaning thereof.

3. Denies the allegations of paragraphs 41 and 42 and refers to the "Guide for 1987/88 Multiple Dwellings" for its precise terms and the meaning thereof.

4. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 1, 2 and 68.

OBJECTIONS IN POINT OF LAW

5. The petition fails to state a cause of action.

6. The claims under the Freedom of Information Law are moot.

WHEREFORE, Respondent demands judgment dismissing the petition in all respects, together with the costs of this proceeding.

New York, New York
November 27, 1987

PETER L. ZIMROTH
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street (Room 5G5)
New York, New York 10007
Tel. (212) 566-0346

TO: Barbara Kraebel
Attorney for Petitioner
60 East 42nd Street, Room 411
New York, New York 10165
Tel. (212) 831-1012

APPENDIX T

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO REARGUE DISMISSAL OF THE PETITION IN THE 1987 PROCEEDING (WITHOUT EXHIBITS)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

- - - -

Appendix T

AFFIDAVIT IN SUPPORT OF MOTIONS TO VACATE THE COURT'S DECISIONS, ORDERS AND JUDGMENT AND TO RENEW THE PETITION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Barbara Kraebel, being duly sworn, deposes and says:

1. I am principal of Barklee Realty Company, Petitioner in this proceeding, am familiar with all the proceedings herein, and make this affidavit in support of Petitioner's motions (a) pursuant to CPLR Section 5015(a)(2) and (3) to vacate this Court's Decision and Order entered August 11, 1987 and this Court's Decision, Order and Judgment entered January 6, 1988 on the grounds of newly-discovered evidence, fraud, misrepresentation, and misconduct of an adverse party, and in the interest of justice, (b) pursuant to CPLR Section 2221, to renew the Petition with said newly-discovered evidence, and (c) for such other and further relief as may be just and proper and as the nature of the proceeding requires.

2. Petitioner brought this proceeding in April 1987 to seek information concerning Respondent's assessment practices as they apply to Petitioner's real property and to prevent increases in said assessments until Respondent changes its practices to satisfy Petitioner's constitutional rights to due process of law and equal protection of the laws.

3. In this proceeding all testimony concerning Respondent's practices was supplied by William K. Block,

Respondent's Deputy Commissioner in charge of its Real Property Bureau.

4. In its Decision and Order entered August 11, 1987 and its Decision, Order and Judgment entered January 6, 1988, this Court dismissed Petitioner's claims that Respondent's assessment practices violate Petitioner's constitutional rights, finding that Petitioner had no standing and that Respondent had no obligation to promulgate uniform assessment standards.

5. On February 18, 1988 Petitioner filed an appeal of said Decision, Orders and Judgment to the Appellate Division First Department, which Petitioner is prosecuting.

6. In September 1988, the New York City Auditor General and the Commissioner of Investigation prepared a Memorandum and Report for Mayor Koch concerning Respondent's so-called change-by-notice procedure for reviewing assessments. Copies of said Memorandum and Report are attached hereto as Exhibit A and referred to herein as the Memorandum and the Report, respectively, and collectively as the Investigatory Documents.

7. When the Petition in this proceeding was heard, Petitioner could not have known about the change-by-notice procedure or the criticisms thereof and recommendations in the Investigatory Documents because the procedure and abuses thereof revealed in the Investigatory Documents were not a matter of public knowledge prior to publication of the Investigatory Documents.

8. Among the criticisms in the Investigatory Documents are that the change-by-notice procedure is available on a selective basis, apparently primarily to large

property owners only, that it relies on unstated and non-uniform criteria for establishing assessment amounts, and that under the procedure Deputy Commissioner Block personally reduced assessments in very large amounts without keeping reliable records of the grounds for his decisions or of evidence justifying reductions (pp. 1-2, 5-9 Report).

9. Among the recommendations in the Investigatory Documents are that Respondent should establish written standards to ensure that assessments are fair and equitable and uniform practices to ensure that all property owners are treated similarly (pp. 11-13 Record[*sic*]). The Memorandum states (at p. 4) that there is "the need to assure that the ... assessors, (Department of Finance) policy-makers, and Tax Commissioners or Commission hearing officers ... are all using the appropriate criteria for determining allowable income and expense, capitalization rate, etc. Otherwise, a real danger of forum-shopping and inequitable treatment arises."

10. The criticisms and recommendations in the Investigatory Documents concerning the change-by-notice review procedure are similar to some of Petitioner's objections concerning Respondent's assessment procedures and substantiate Petitioner's claims that these procedures are unreasonable and applied unequally.

11. Had the Court known about Deputy Commissioner Block's practices set forth in the Investigatory Documents, the result of this proceeding would probably have been different because these practices undermine the credibility of Deputy Commissioner Block's testimony in this proceeding concerning Respondent's assessment methods.

12. Had the Court known about the criticisms and recommendations concerning Respondent's assessment

procedures set forth in the Investigatory Documents, the result of this proceeding would probably have been different because these criticisms and recommendations substantiate Petitioner's allegations that Respondent's assessment procedures are without adequate guidelines and standardized procedures to satisfy due process and equal protection requirements. Indeed, the Investigatory Documents confirm that the assessment methods described by Deputy Commissioner Block are applied, if at all, on a selective basis that is highly prejudicial to small property owners like Petitioner who are least able to contest their fairness and rationality.

13. No previous application for the relief herein sought has heretofore been made.

14. Based upon the foregoing and upon all of the pleadings and proceedings herein, Petitioner respectfully requests:

(a) that, pursuant to CPLR Section 5015(a)(2) and (3), this Court vacate this Court's Decision and Order entered August 11, 1987 and this Court's Decision, Order, and Judgment entered January 6, 1988 on account of newly-discovered evidence and fraud, misrepresentation and misconduct of an adverse party;

(b) that, pursuant to CPLR Section 2221, this Court renew the Petition, with said newly-discovered evidence; and

(c) that this Court grant such other and further relief as may be just and proper and as the nature of the proceeding requires.

/s/ Barbara Kraebel
Barbara Kraebel

Sworn to before me this
16th day of November, 1988.

/s/ Deborah Suntak
Deborah Suntak
Notary Public, State of New York
No. [Illegible]
Qualified in New York County
Commission Expires March 30, 1989

APPENDIX U

UNITED STATES CONSTITUTION

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX V

UNITED STATES CONSTITUTION

Article VI, Clause 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

APPENDIX W

UNITED STATES CODE

Title 42, Section 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX X

UNITED STATES CODE

Title 28, Section 1341:

Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

APPENDIX Y

NEW YORK CIVIL PRACTICE LAW AND RULES
(In pertinent part)

§ 5601. Appeals to the court of appeals as of right.

...

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States...

.....

§5602. Appeals to the court of appeals by permission.

(a) Permission of ... court of appeals. An appeal may be taken to the court of appeals by permission of the ...court of appeals ... upon direct application... Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court...
   (i) from an order of the appellate division which finally determines the action and which is not appealable as of right...

APPENDIX Z

NEW YORK REAL PROPERTY TAX LAW

§305. Assessment methods and standard

1. The existing assessing methods in effect in each assessing unit on the effective date of this section may continue.

2. All real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment) except that, if the administrative code of a city with a population of one million or more permitted, prior to January first, nineteen hundred eighty-one, a classified assessment standard, such standard shall govern unless such city by local law shall elect to be governed by the provisions of this section.

3. Any assessing unit in which assessments are at full value by reason of a revaluation may adopt a level of assessment in accordance with this section.

Historical Note

Effective Date. Section effective Dec. 3, 1981, pursuant to L. 1981, c. 1057, §17.

.....

§489 Exemption from taxation of alterations and improvements to multiple dwellings to eliminate fire and health hazards; abatement.

.....

.9*. [In pertinent part] During the period of such exemptions the assessment on any such land and dwelling after such alterations and improvements, exclusive of the increase in valuation which is subject to exemption in full or proportionally under subdivision one of this section, shall not exceed the valuation of the previously existing dwelling appearing on the assessment rolls after the taxable status date immediately preceding the commencement of such alterations and improvements plus the value of the land, any improvements other than those made under the provisions of this section and the proportion of increased assessed valuation that is not exempt from taxation under this section, which proportion shall remain constant during the term of the exemption...

---

* Amendments made to this Section in 1987 do not apply because the improvements to the Property commenced before the amendment became effective.

APPENDIX AA

NEW YORK SUPREME COURT CIVIL RULES

§ 202.60 Tax Assessment Review Proceedings in Counties Within the City of New York; Special Rules

(a) Applicability. This section shall apply to every tax assessment review proceeding brought pursuant to title 1 of article 7 of the Real Property Tax Law in a county within the City of New York.

(b) Preliminary Conference.

(1) Any party to a tax assessment review proceeding may demand, by application served on all other parties and filed with the court, together with proof of such service, a preliminary conference, or the court on its own motion may direct a preliminary conference. The court, in its notice to the parties setting the date for the conference, shall direct the petitioner to serve upon the respondent by a date certain before the date of the conference, the completed income and expenses required by this section, together with any ancillary papers or documents that may be necessary. No note of issue may be filed until a preliminary conference has been held.

(2) The judge presiding at the preliminary conference shall take whatever action is warranted to expedite final disposition of the case, including, but not limited to:

(i) directing any party to utilize or comply by a date certain with any pretrial disclosure or bill of particulars procedure authorized by the Civil Practice Law and Rules;

(ii) directing the parties to obtain appraisals and sales reports, and to exchange and file appraisal reports and sales reports by dates certain before the trial;

(iii) directing the filing of a note of issue and certificate of readiness;

(iv) fixing a date for trial, or by which the parties must be ready for trial;

(v) signing any order required;

(vi) conducting conferences for the purpose of facilitating settlement; and

(vii) limiting issues and recording stipulations of counsel.

(3) Failure to comply with any order or directive of the court authorized by this subdivision shall be subject to appropriate sanctions.

(4) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations or commitments, or accompanied by a person empowered to act on behalf of the party represented, shall appear at the conference.

(c) Statement of Income and Expenses. Before the note of issue and certificate of readiness may be filed, the petitioner shall have served on the respondent, in triplicate, a statement that the property is not income-producing or a copy of a verified or certified statement of the income and expenses of the property for each tax year under review. If the property is income-producing, the petitioner must serve

the statement of income and expenses on forms provided by the Tax Certiorari Division of the Office of the Corporation Counsel of the City of New York. The petitioner shall complete all items listed on such form. A copy of such completed form shall also be filed with the note of issue and certificate of readiness. For the purposes of this section, a cooperative or condominium apartment building shall be considered income-producing property; an owner-occupied business property shall be considered income-producing as determined by the amount reasonably allocable for rent, but the petitioner is not required to make an estimate of rental income.

(d) Audit. Within 60 days after the first preliminary conference, the respondent, for the purpose of substantiating petitioner's completed statement of income and expenses, as required by subdivision (c), may request in writing an audit of the petitioner's books and records for the tax years under review. If requested, the audit must be completed within 120 days after the request has been made unless the court, upon good cause shown, extends the time for the audit. Failure of the respondent to request or complete the audit within the time limits shall be deemed a waiver of such privilege. If an audit is requested and the petitioner fails to furnish its books and records within a reasonable time after receipt of the request, or otherwise unreasonably impedes or delays the audit, the court, on motion of the respondent, may dismiss the petition or petitions or make such other order as the interest of justice requires.

(e) Filing Note of Issue and Certificate of Readiness; Additional Requirements.

(1) A Note of issue and certificate of readiness shall not be filed unless all disclosure proceedings have been completed

and the statement of income and expenses has been served and filed. A note of issue and certificate of readiness may not be filed in any action where a preliminary conference was requested or was directed by the court until the conference has been held and there has been compliance with any orders or directives of the court on stipulations of counsel made at such conference.

(2) A separate note of issue shall be filed for each property for each year.

(f) Consolidation or Joint Trial. Consolidation or joint trial of real property tax assessment review proceedings in the discretion of the court shall be conditioned upon service having been made of the verified or certified income and expense statement, or a statement that the property is not income-producing, for each of the tax years under review.

(g) Exchange and Filing of Appraisal Reports.

(1) Upon the filing of the note of issue and certificate of readiness, the court, if it has not previously so directed, shall direct that appraisal reports and sales reports be obtained and that appraisal reports and sales reports be exchanged and filed by a date certain a specified time before the date scheduled for trial.

(2) The exchange and filing of appraisal reports shall be accomplished by the following procedure:

(i) The respective parties shall file with the clerk of the trial court one copy, or in the event that there are two or more adversaries, a copy for each adversary, of all appraisal reports intended to be used at the trial.

(ii) When the clerk shall have received all such reports, the clerk forthwith shall distribute simultaneously to each of the other parties a copy of the reports filed.

(iii) Where multiple parties or more than one parcel is involved, each appraisal report need be served only upon the taxing authority and the party or parties contesting the value of the property which is the subject of the report. Each party shall provide an appraisal report copy for the court.

(3) The appraisal reports shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached. If sales, leases or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as to permit the transaction to be readily identified, and the report shall contain a clear and concise statement of every fact that a party will seek to prove in relation to those comparable properties. The appraisal reports also shall contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs.

(4) Where an appraiser appraises more than one parcel in any proceeding, those parts of the separate appraisal reports for each parcel that would be repetitious may be included in one general appraisal report to which reference may be made in the separate appraisal reports. Such general appraisal reports shall be served and filed as provided in paragraph (1) of this subdivision.

(5) Appraisal reports shall comply with any official form for appraisal reports that may be prescribed by the Chief Administrator of the Courts.

(h) Use of Appraisal Reports at Trial. Upon the trial, expert witnesses shall be limited in their proof of appraised value to details set forth in their respective appraisal reports. Any party who fails to serve an appraisal report as required by this section shall be precluded from offering any expert testimony on value, provided, however, upon the application of any party on such notice as the court shall direct, the court may, upon good cause shown, relieve a party of a default in the service of a report, extend the time for exchanging reports, or allow an amended or supplemental report to be served upon such conditions as the court may direct. After the trial of the issues has begun, any such application must be made to the trial judge and shall be entertained only in unusual and extraordinary circumstances.

Supreme Court, U.S.
FILED
JAN 29 1996
CLERK

(2)

No. 95-1042

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARBARA KRAEBEL Doing business As
BARKLEE REALTY COMPANY,

Petitioner,

- against -

THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PAUL A. CROTTY,
Corporation Counsel of
the City of New York
Attorney for Respondent
100 Church Street
New York, New York 10007
(212) 788-1024 or 0429

ELIZABETH DVORKIN,*
PHILIP AZARIAN,
of Counsel

January 24, 1996
*Attorney of Record

15 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Courts of the State of New York will entertain constitutional and due process challenges to real property tax assessment practices.

2. Whether Petitioner's federal civil rights claims regarding state tax assessment methods are immune to preclusive effect given by New York State courts.

TABLE OF CONTENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT

POINT I

INDIVIDUAL TAXPAYERS CAN CHALLENGE THE LEGALITY OR CONSTITUTIONALITY OF REAL PROPERTY TAX ASSESSMENT PRACTICES IN STATE COURT.

. 5

POINT II

PETITIONER'S FEDERAL CIVIL RIGHTS CLAIMS REGARDING THE CITY'S ASSESSMENT METHODS ARE NOT IMMUNE TO THE APPLICATION OF COLLATERAL ESTOPPEL AND RES JUDICATA BY NEW YORK STATE COURTS. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases: Page

Allen v. McCurry,
449 U.S. 90 (1980) 9

Barklee Realty Company v.
New York City Dept. of Finance,
147 A.D.2d 990, 537 N.Y.S.2d 942,
leave to appeal denied, 75 N.Y.2d 702,
551 N.E.2d 601 (1990) 4

Board of Managers of Acorn Ponds
at North Hills Condominium No. 3 v.
Board of Assessors,
197 A.D.2d 620, 603 N.Y.S 2d 491,
appeal denied, 83 N.Y.2d 759, 616 N.Y.S.2d 14,
639 N.E.2d 754 (1994) 6

Board of Managers of Greens of North America
v. Board of Assessors,
202 A.D.2d 417, 608 N.Y.S2d 694,
appeal denied, 83 N.Y.2d 757, 615 N.Y.S.2d 874,
639 N.E.2d 415 (1994) 7

Dudley v. Kerwick,
52 NY2d 542, 439 N.Y.S.2d 305,
421 N.E. 2d 797 (1981) 5

Estate of Herbert Rogowsky v.
Board of Assessment,
191 A.D.2d 697,
595 N.Y.S.2d 530 (1993) 8

Kraebel v. Department of Finance,
_A.D.2d_ (1st Dept. 1995),
629 N.Y.S.2d 42, appeal dismissed,
_N.Y.2d_ (1995), 634 N.Y.S.2d 438,
658 N.E.2d 216 3

Krugman v. Board of Assessors,
141 A.D.2d 175,
533 N.Y.S.2d 495 (2d Dept. 1988) 7

Long Island Lighting Co. v. Town of Brookhaven,
889 F.2d 428, (2nd Cir. 1989) 8

Matter of Chaslow v. Board of Assessors,
202 A.D.2d 499, 609 N.Y.S.2d 27
(2d Dept. 1994), appeal denied,
83 N.Y.2d 759, 616 N.Y.S.2d 14,
639 N.E.2d 754 (1994) 6

Matter of Mundinger v. Assessor of Rye,
187 A.D.2d 594, 590 N.Y.S.2d 122
(2d Dept. 1992) 6

Migra v. Warren City School District
Board of Education,
465 U.S. 75 (1984) 9

Nash v. Assessor, Town of Southampton,
168 A.D.2d 102, 571 N.Y.S.2d 122
(2d Dept. 1991) 6

No. 95-1042

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARBARA KRAEBEL Doing business As
BARKLEE REALTY COMPANY,

Petitioner,

- against -

THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

STATEMENT OF FACTS

Petitioner is the owner of a 16 unit residential apartment building located in Borough of Manhattan in the City of New York. Petitioner's property currently enjoys a partial real property tax exemption granted to petitioner

under a City program known as the "J-51" program, a program to encourage the rehabilitation and improvement of the City's housing stock by granting partial real property tax exemptions based on improvement costs.

In June, 1993 petitioner commenced a proceeding pursuant to Article 78 of the New York Civil Practice Laws and Rules ("CPLR"), and under 42 U.S.C. §1983, alleging, inter alia, that: 1) her property's 1993/94 tax assessment was excessive, and that the amount of her "J-51" exemption was understated; 2) New York City Department of Finance ("Finance") violated her constitutional rights to due process and equal protection of the law by failing to adopt "uniform standards of assessment"; and 3) Real Property Tax Law ("RPTL") §305 violated both state and federal constitutions.

The Respondent City Department of Finance moved to dismiss the proceeding on two grounds. First,

petitioner's assessment claims could only be raised in a proceeding brought pursuant to RPTL Article 7, the exclusive statutory remedy for challenges to real property tax assessments; and second, petitioner's constitutional claims concerning RPTL §305 and Finance's assessment procedures were barred by res judicata and collateral estoppel since those claims were fully litigated by the Petitioner in 1987 in a prior proceeding.

The trial court granted the motion on both grounds and the New York State Supreme Court, Appellate Division, First Department, unanimously affirmed. ___A.D.2d___, 629 N.Y.S.2d 42 (1st Dept. 1995) (Petitioner's Appendix A). Petitioner sought an appeal as of right to the New York State Court of Appeals, but the the appeal was dismissed by that court sua sponte. ___N.Y.2d___, 634 N.Y.S.2d 438, 658 N.E.2d 216 (1995) (Petitioner's Appendix B).

Petitioner's constitutional claims in the present proceeding were identical to those previously raised and decided in the 1987 proceeding. In the 1987 proceeding, the trial court dismissed petitioner's constitutional claims for lack of standing (Petitioner's Appendix E). Later, in a subsequent decision, the trial court revisited petitioner's constitutional claims and denied them on the merits (Petitioner's Appendix F p. 20a-23a). The Appellate Division, First Department affirmed the Supreme Court judgment and the Court of Appeals denied petitioner leave to appeal. Barklee Realty Company v. New York City Dept. of Finance, 147 A.D.2d 990, 537 N.Y.S.2d 942 (1st Dept. 1989), leave to appeal denied, 75 N.Y.2d 702, 551 N.E.2d 601 (1990).

BEST AVAIL

REASONS FOR DENYING THE WRIT

POINT I

INDIVIDUAL TAXPAYERS CAN CHALLENGE THE LEGALITY OR CONSTITUTIONALITY OF REAL PROPERTY TAX ASSESSMENT PRACTICES IN STATE COURT.

Petitioner's assertion that the decision of the Appellate Division precludes taxpayers from challenging the legality or constitutionality of real property assessment methods is patently incorrect. New York courts will entertain challenges to the legality or constitutionality of state assessment practices by taxpayers when properly presented in a declaratory judgment action, or in a proceeding pursuant to CPLR Article 78. See Dudley v. Kerwick 52 NY2d 542, 547-552, 439 N.Y.S.2d 305, 421 N.E.2d 797 (1981) (CPLR Article 78 challenge by taxpayers against town assessor's practice of granting full tax exemptions to all property owners affiliated with a

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religious organization); Matter of Chaslow v. Board of Assessors, 202 A.D.2d 499, 609 N.Y.S.2d 27 (2d Dept. 1994), appeal denied, 83 N.Y.2d 759, 616 N.Y.S.2d 14, 639 N.E.2d 754 (1994) (CPLR Article 78 proceeding challenging counties' method of assessing residential properties as illegal and unconstitutional); Board of Managers of Acorn Ponds at North Hills Condominium No. 3 v. Board of Assessors, 197 A.D.2d 620, 603 N.Y.S. 2d 491 (2d Dept. 1993), appeal denied, 83 N.Y.2d 759, 616 N.Y.S.2d 14, 639 N.E.2d 754 (1994) (the appropriate vehicle for asserting claim that assessors' method of reassessment was unconstitutional is a CPLR Article 78 proceeding); Matter of Mundinger v. Assessor of Rye, 187 A.D.2d 594, 595, 590 N.Y.S.2d 122 (2d Dept. 1992) (successful challenge to the practice of "selective reassessment" of waterfront property as violative of equal protection); Nash v. Assessor, Town of Southampton, 168

A.D.2d 102, 104-108, 571 N.Y.S.2d 122 (2d Dept. 1991) (constitutional challenge to town's reassessment program on equal protection grounds); Krugman v. Board of Assessors, Village of Atlantic Breach, 141 A.D.2d 175, 179-184, 533 N.Y.S.2d 495 (2d Dept. 1988) (challenge to assessment methods on constitutional grounds converted to a CPLR Article 78 proceeding).

To properly assert such claims in a declaratory judgment action or CPLR Article 78 proceeding, the taxpayer must be challenging the methods as applied to several properties. Board of Managers of Greens of North America v. Board of Assessors, County of Nassau, 202 A.D.2d 417, 419, 608 N.Y.S.2d 694 (2d Dept. 1994), appeal denied, 83 N.Y.2d 757, 615 N.Y.S.2d 874, 639 N.E.2d 415 (1994). But where the challenge concerns the overvaluation of the taxpayer's individual property, the taxpayer must instead seek relief via a proceeding pursuant

to RPTL Article 7, the exclusive statutory remedy for challenging individual tax assessments. Id.; Dudley v. Kerwick, supra; Estate of Herbert Rogowsky v. Board of Assessment, Village of Port Chester, 191 A.D.2d 697, 698, 595 N.Y.S.2d 530 (2d Dept. 1993).

Petitioner's CPLR Article 78 proceeding, while purporting to challenge the assessment methods of the City Department of Finance on constitutional grounds, really concerned the overvaluation of her specific property. Accordingly, petitioner's exclusive remedy was by way of an RPTL Article 7 proceeding.

An RPTL Article 7 proceeding provides a complete and expeditious remedy to taxpayers who wish to challenge an illegal or excessive assessment. See Dudley v. Kerwick, supra, at 548-550. The availability of this remedy would therefore satisfy due process and equal protection of the law. See Long Island Lighting Co. v. Town of

Brookhaven, 889 F.2d 428 (2nd Cir. 1989) (RPTL Article 7 provides a plain, speedy and efficient remedy for purposes of the Tax Injunction Act).

POINT II

PETITIONER'S FEDERAL CIVIL RIGHTS CLAIMS REGARDING THE CITY'S ASSESSMENT METHODS ARE NOT IMMUNE TO THE APPLICATION OF COLLATERAL ESTOPPEL AND RES JUDICATA BY NEW YORK STATE COURTS.

Petitioner's §1983 claims were previously raised in the 1987 proceeding and were barred in the 1993 proceeding by res judicata and collateral estoppel. A state's application of res judicata and collateral estoppel with respect to §1983 claims will be given full force and effect by the federal courts. Migra v. Warren City School District Board of Education, 465 U.S. 75, 76, 81-88 (1984); Allen v. McCurry, 449 U.S. 90, 97-99 (1980). Petitioner's claims were litigated and re-litigated in the 1987

proceeding and were dismissed on the merits. Accordingly, the fact that petitioner raised claims purporting to sound under 42 U.S.C. §1983 does not render those claims immune to preclusion in the 1993 proceeding.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

January 24, 1996

Respectfully submitted,

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No. 95-1042

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondent.

On Petition For A Writ Of Certiorari
To The New York State Supreme Court,
Appellate Division, First Department

REPLY BRIEF

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February 2, 1996

5 pp

TABLE OF CONTENTS

PAGE

POINT I. INDIVIDUALS WITH A SINGLE CLAIM ARE ENTITLED TO ENFORCE THEIR FEDERAL CONSTITUTIONAL RIGHTS 1

POINT II. THE FULL FAITH AND CREDIT CLAUSE DOES NOT PREVENT THIS COURT FROM REVIEWING A STATE COURT DETERMINATION THAT *RES JUDICATA* BARS A FEDERAL CLAIM 3

CONCLUSION 3

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REPLY BRIEF

POINT I. INDIVIDUALS WITH A SINGLE CLAIM ARE ENTITLED TO ENFORCE THEIR FEDERAL CONSTITUTIONAL RIGHTS.

Respondent argues that New York property owners can only bring declaratory judgment or CPLR Article 78 proceedings to enforce legal and constitutional rights with

respect to real property assessments if the proceedings involve more than one property (Resp. Br. pp. 7-8).

But the Fifth and Fourteenth Amendments, 42 U.S.C. §1983, and this Court's rulings do not require multiple claims or multiple claimants in order to bring constitutional challenges to government action.

Respondent errs in relying on *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428 (2nd Cir. 1989), to justify denying a property owner with only one property the right to seek declaratory or injunctive relief with respect to real property assessments. The Circuit Court denied federal jurisdiction in that case in part because of Article 7 proceedings which had been ongoing for 10 years, finding that LILCO was able to prosecute such complex and prolonged cases. *Id.* at 433. Many owners of a single property do not have the capacity for such litigation, much less small owners like Petitioner. Moreover, the Court's denial of federal jurisdiction rested in relevant part upon a determination that declaratory and Article 78 proceedings to raise constitutional objections to the assessment process were available to LILCO in New York courts. *Id.* at 431-433.

POINT II. THE FULL FAITH AND CREDIT CLAUSE DOES NOT PREVENT THIS COURT FROM REVIEWING A STATE COURT DETERMINATION THAT *RES JUDICATA* BARS A FEDERAL CLAIM.

Respondent would bar this Court from reviewing the decision below as to the *res judicata* effect of the 1987 Proceeding because of federal cases which have applied the Full Faith and Credit Clause to bar federal proceedings after non-appealable state court determinations on the same factual circumstances. Such cases do not prevent this Court from reviewing a state court determination that *res judicata* bars federal claims when the claims are based on new factual circumstances and when the *res judicata* determination is manifestly unjust, contrary to the *res judicata* standards of state law, and inconsistent with the rulings of this Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition For A Writ Of Certiorari, Petitioner respectfully requests that a writ of certiorari be issued to review the decision and order of the New York State Supreme Court Appellate Division, First Department.

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